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THE

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IN THE

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THE NATIONAL

BANKRUPTCY REGISTER.

REPORTS.

VOLUME IV.

UNITED STATES DISTRICT COURT—VERMONT.

Where District Court of Vermont, by bill in equity, is prayed to arrest litigation pending in the State court, and to hear and determine the controversies involved. Bankrupt, Clark, and defendant, O. A. Burton, are brothers-in-law, and in 1860, Clark's property was attached by Burton to the value of ten thousand dollars; and by the Franklin County Bank, a corporation in which O. A. Burton owned a controlling interest, to the amount of five thousand dollars. Clark also made a claim against Burton, demanding seventy-five thousand dollars—these were all actions of assumpsit.

These controversies were, in 1862, submitted to arbitrators, and were contested from time to time down to 1867, when one of the arbitrators died, and the litigations were reopened in the State court. In 1867, O. A. Burton commenced an action against Clark for one hundred and fifty thousand dollars, on book-account, and an attachment to that amount was levied on Clark's property, subject to the preceding ones, and to certain mortgage liens, and in 1868 obtained a verdict for forty-six thousand dollars, in an action, Clark *v.* Burton. The cases were then carried to the Supreme Court, January, 1870, and a motion made by Clark's counsel to continue it till next following term, January, 1871. The cases were remanded to the County Courts. There were also two chancery suits, Burton *v.* Clark and Barlow, and Clark *v.* Burton, for five seven thousand dollar notes.

On 19th February, 1870, a petition was filed against Clark in involuntary bankruptcy, and on 9th March, he was adjudicated bankrupt, and on 18th February, the day before the petition was filed, an agreement was executed by Clark and Burton to discontinue suits. This is charged as being an illegal preference in fraud of the Bankrupt Act.

Held, 1. That such agreement is in fraud of the Bankrupt Act, and an attempted invasion of the rights of the general creditors.

2. It is the duty of the court to grant some effectual relief against the use of this agreement, and secure to the assignee all the rights which the Bankrupt Act confers upon him.

3. The District Court has no authority to withdraw these cases from the State court, and proceed to their trial here. Congress has not provided that such cases shall be transferred to the District Court, much less has it provided that the District Court may proceed to determine the subject-matter of suits pending in the State courts by issue framed here, to be

tried by jury or in any other manner. That part of the prayer of the bill which invokes this mode of relief is therefore denied.

4. An injunction must issue to restrain O. A. Burton from using in any matter the agreement of February 18th, 1870; and if necessary, an order will be placed on Clark requiring him to execute such papers as will enable the assignee to appear in the cases in the State courts.
5. If the transfer by Burton of the items once filed by way of offset in the suit in assumpsit to the book account is in fraud of the Bankrupt Act, though not in conflict with the practice in the State courts, the Bankrupt Act must prevail as the paramount law, and prevent the transfer.
6. Stay of proceedings is granted in all the cases referred to in the bill, until the questions involved can be determined in that court.

AMOS J. SAMPSON, *Assignee of* ALUNSON M. CLARK *v.* OSCAR A. BURTON, FRANKLIN COUNTY BANK, AND CARLOS C. BURTON.

SHIPMAN, J.—This is a suit in equity, praying, for reasons set forth in the bill, this court to restrain the defendant from proceeding with certain suits now pending in the State courts of Vermont, in which the defendants are severally parties on the one side, and Clark, the bankrupt, is a party on the other; and also praying that this court direct that the controversies involved in the suits then pending in the State courts, be heard and determined in this court under such issues as this court shall order. For a clear understanding of the questions now to be decided, it will be necessary to give a brief history of the litigation pending in the State tribunals, which this court is now asked to arrest.

The bankrupt, Alunson M. Clark, and the defendant, Oscar A. Burton, are brothers-in-law, and prior to the year 1860 were on friendly terms, and had business transactions together; but during that year disputes arose between them, and they both resorted to the State courts. Among the suits instituted by the parties that year, was one by Oscar A. Burton against Clark, in which his property was attached to the value of ten thousand dollars; one by the Franklin County Bank, a corporation in which it is said that Oscar A. Burton owned a controlling interest, against Clark, in which his property was attached to the value of five thousand dollars; and one by Clark against Oscar A. Burton, demanding seventy-five thousand dollars. These were all actions of assumpsit.

In 1862 the controversies between Clark and Oscar A. Burton were, by mutual agreement, submitted to three arbitrators, the suits still remaining in court without any actions being taken in them by either party. The claims of the parties were contested before the arbitrators from time to time, down to the year 1867, when one of the arbitrators died before a conclusion was reached, thus terminating the submission. The litigations were then re-opened in the courts, and though Oscar A. Burton had, as early as 1861, in the action of assumpsit, which Clark had brought against him in 1860, filed a declaration in offset containing the common counts, setting up a claim of seventy thousand dollars, yet, on the 26th of August, 1867, he commenced a suit known in Vermont as an action of book-account, in which he demanded one hundred and fifty thousand dollars as justly due him from Clark to balance book-account between them. The direction in the writ was to attach to the value of one hundred and fifty thousand dollars, and an attachment to that amount was actually levied upon all Clark's property, amounting to a hundred thousand dollars, more or less. This attachment was, of course, subject to the preceding ones in favor of Oscar A. Burton and the Franklin County Bank, and also to one by Carlos C. Burton, in a suit brought by him against Clark, in March of the same year. It was also subject to one or more prior mortgage liens. In the meantime Clark proceeded with his action of assumpsit against Oscar A. Burton, and the same was brought to trial at the April term of the Franklin County Court in 1868, and resulted in a verdict of about forty-six thousand dollars in favor of the defendant on his plea, or declaration, of set-off. This cause was then carried to the Supreme Court on a bill of exceptions, where it remained until the January term of the latter, in 1870. At that term a motion was made by Clark's counsel, to continue the cause till the next following term, in January, 1871.

It is unnecessary to detail the reasons set forth on behalf of Clark in support of this motion for a continuance, but it was strenuously insisted by both Clark and his counsel in their affidavits, that the judgment in favor of Burton ought not to

stand, and that the same would be reversed by the Supreme Court if the case could be fully presented by the plaintiff. Thereupon Burton entered his consent that the same should be reversed, and it was reversed, and a new trial ordered. The case was, of course, remanded to the County Court, where it now stands.

To the action of book-account brought by Oscar A. Burton against Clark, in August, 1867, demanding one hundred and fifty thousand dollars, the latter filed a plea in abatement, alleging, as grounds of abatement, that the matters intended by Burton to be determined in that suit, had been set up by him as defendant in the action of assumpsit, brought by Clark against him, and were therefore then pending in that suit. This plea in abatement was overruled, to which ruling the defendant excepted, and auditors were appointed to adjust the accounts between the parties, and report to the court, as is customary in actions of this character, which, it may be remarked here, are peculiar forms of suits in use in Vermont and Connecticut, and nowhere else. The parties appeared before the auditors on the 18th of May, 1869, when the hearing was adjourned, on motion (of which party does not appear), to the 12th of July, 1869, when the parties appeared again, and, on motion of the plaintiff, the hearing was further postponed to the 19th of July, 1869. The parties appeared on the last-named day, and the plaintiff then moved to postpone the hearing till after the then next term of the Supreme Court for Franklin county. This motion was supported by a long affidavit of the plaintiff, detailing certain alleged facts which need not be recited here. The auditors overruled this motion, and refused to further postpone the hearing, directing that the same should then be proceeded with. Neither party presented any account for adjudication. The auditors made their report to the court at its next term, on the second Tuesday of September following. In their report they recited their action in postponing the hearing to the 19th of July, their denial of the plaintiff's motion to postpone made on that day, and the fact that the parties declined to present any accounts. They then

report nothing due either party to balance book-accounts, and leave the matter for such action as the court might deem proper for the protection of the rights of the parties. To this report the auditors annexed a copy of the plaintiff's affidavit, presented to them in support of his last motion for a further postponement.

At the same time, and on presentation of this report, the plaintiff moved, "for reason s apparent on said report, and the papers thereto annexed and referred to," that the cause be recommitted to the auditors. This motion was granted by the court, to which ruling the defendant excepted. In this condition that cause now stands.

There were also two suits in chancery, one brought by Oscar A. Burton against Clark and Bradley Barlow, and one by Clark against O. A. Burton. The one against Clark and Barlow was to restrain the transfer or collection of five seven thousand dollar notes, amounting in all to thirty-five thousand dollars, and dated February 1st, 1860, which were originally given by Oscar A. Burton to Clark, and by him indorsed, before due, to Barlow, Burton claiming that they were accommodation notes without consideration, and that Barlow took them with knowledge of that fact. The other chancery suit was one brought by Clark *v.* Burton, and had reference to the same subject-matter.

It is conceded that the claims respectively set up by the parties in these suits were, from their commencement, the subject of a protracted, bitter, and severely contested litigation, each insisting that the demands of the other were unfounded and fraudulent. This hostile and uncompromising attitude of Clark and Burton toward each other apparently continued down to January, 1870.

But, though Clark was, during all this time, the owner of a large and valuable real estate, and considerable personal property, suits from other quarters accumulated against him. During the years 1868 and 1869, actions to the number of nearly twenty were commenced against him in the courts of the State, upon which his property was attached to the amount of over

one hundred thousand dollars. The last attachment levied, which the evidence discloses, was on the 7th December, 1869. On the 19th February, 1870, a petition was filed in this court against Clark in involuntary bankruptcy, and after a trial by jury, he was, on the 9th March, adjudicated a bankrupt, from which an appeal was taken, and is now pending in the Circuit Court. The assignee was duly appointed, who has instituted this suit.

On the 18th February, 1870, the day before the petition in bankruptcy was filed, Clark and Oscar A. Burton executed the following agreement:

This agreement, made this 18th day of February, 1870, between Oscar A. Burton, of Burlington, in the county of Chittenden, and Alunson M. Clark, of St. Albans, in the county of Franklin, witnesseth:

First. The suit now pending in the Franklin County Court in favor of said Clark against said Burton is to be non-suit, without costs, at the next term of said court.

Second. The suit in chancery now pending in Chittenden county, in favor of said Burton, against said Clark and Bradley Barlow, is hereby discontinued without costs.

Third. The suit in chancery now pending in Franklin county, in favor of said Clark against said Burton, is hereby discontinued without costs.

Fourth. In the action of book-account now pending in Franklin County Court, in favor of said Burton against said Clark, wherein Timothy P. Redfield, Homer W. Heaton, and Silas P. Carpenter are auditors, the said parties may file all the claims included in their specifications in the suit in favor of said Clark above-named, and which is hereby agreed to be entered non-suit. And the said Clark may also file in said action his five promissory notes, each dated February 1st, 1860, and no objection shall be made by either party to the determination of any of said claims by said auditors. And it is further agreed that the statute limitations shall not be a bar or defense to said claims, or any of them, on either side, but that the auditors in said case shall hear and determine said claims

upon their merits, under the proofs to be submitted to them.

(Signed) A. M. CLARK,
O. A. BURTON.

This agreement is charged in the bill to be collusive and fraudulent, and it is averred that in any aspect in which it can be viewed, it is in fraud of the Bankrupt Act, intended to give an illegal preference to Burton over the other creditors of Clark, and that, if carried out, such will be its inevitable effect. The answer of Burton denies the alleged fraud and collusion, and insists that the agreement confers no right or advantages upon him, Burton, which was not legally his by virtue of the proceedings taken in the State courts, prior to the making of the agreement. There are other allegations in the bill and answer which need not here be recited. In brief, the theory of the plaintiff, who represents the general creditors of the bankrupt, is, that the agreement is part of a scheme concocted by Burton and Clark, by which the former, under cover of the action of book-account, and the attachment therein pending in his favor against Clark, intends to appropriate all Clark's property, and thus secure a fraudulent preference over the rest of the creditors of the bankrupt. The defendant, Oscar A. Burton, insists that the agreement does not enlarge his legal rights, as they were fixed, and stood long prior to the four months next preceding the date of the filing of the petition in bankruptcy, and that the only purpose was and is, to secure a speedy and economical determination of the litigation between him and Clark, in conformity to law.

Now, without stopping to analyze the motives of the parties to this agreement, or consider the possible advantage, if any, which might accrue to any one else except Oscar A. Burton, by the waiver of the Statute of Limitations, their intentions are to be judged by the legal effect of their act. This is a familiar legal test, and has recently been applied by Mr. Justice Woodruff of this Circuit in New York, in the case of *Clark* v. *Bininger*. When read in the light of the undeniable facts touching

the condition of these parties, and especially the situation of Clark, on the eve of bankruptcy, with every dollar of his estate buried under repeated attachments, the object of this agreement is quite obvious. Burton had consented to a reversal of his judgment of forty-six thousand dollars, recovered by way of offset in the action of assumpsit brought by Clark against him, though I see no just grounds of complaint by Clark's creditors on this score. The reversal of that judgment was insisted on by Clark's counsel, who are amongst his creditors, and by Clark himself, when he was, as the assignee now avers, resisting in good faith the alleged fraudulent claims of Burton, one of which was the demand upon which this judgment in offset was founded. Still, that judgment had just been reversed, while the action of book-account, with the attachment of one hundred and fifty thousand dollars, was still pending, as Burton was defendant in the action of assumpsit, and made his claims therein by way of offset, whatever he might recover in that suit would be unsecured by any attachment. On the other hand, whatever he might legitimately recover as plaintiff in the action of book-account, was already secured by his attachment in the latter suit, assuming that that attachment was a lien upon Clark's property, which the adjudication of the latter, as a bankrupt, could not dissolve. This agreement therefore was entered into, by which the assumpsit was to be abandoned, and all the claims which had been litigated therein transferred to the action of book-account, for the purpose of sheltering any sum that Burton might recover under the lien of attachment. I have no hesitation in holding that such an agreement, entered into under the circumstances which undeniably existed, so far as it could, if carried out, change the relations of these parties, and control the litigation in its subsequent stages, is in fraud of the Bankrupt Act, and an attempted invasion of the rights of the general creditors, of whom the assignee is the representative. I have no doubt, on the proofs before me, that both Clark and Burton entered into this arrangement with a view to Clark's bankruptcy, and with the design of materially directing the future course of the litigation by placing certain features of

it, at least, beyond the control of the assignee. It was consummated, not incautiously or ignorantly, but, by Burton, under the advice of counsel, and by Clark against the repeated and earnest protest of his legal advisers. In this view of the matter it is, I think, obvious that it is the duty of this court to grant some effectual relief against the use of this agreement, and secure to the assignee the free and untrammeled exercise of all the rights which the Bankrupt Act confers upon him with reference to this litigation, whether in the prosecution or defense of suits in which he has a clear right under the law to be substituted as a party in place of this bankrupt.

This brings me to the consideration of the prayer of the bill, and of the specific form and extent of the relief which can be granted. The prayer of the bill is simple and comprehensive. It asks, in effect, this court to restrain Oscar A. Burton from proceeding in any manner in the State courts, at least till after the question of the bankrupt's discharge is settled, and then that this court, by an issue to a jury or some other mode of trial, proceed to settle and adjust the claims of Clark and Burton upon each other. If this course were authorized by law, and practicable, it might prove an easy solution to some of the difficulties which present themselves in the case now before us. Passing now the question as to the power of the court to enjoin the defendant against proceeding at all (which will be considered hereafter), I apprehend that it has no authority to withdraw these cases from the State courts and proceed to their trial here. Congress could no doubt have made an adjudication in bankruptcy operate, *propria vigore*, to withdraw all cases in which the bankrupt should be a party pending in the State courts in the district, at the time of filing the petition, from those tribunals, and transfer them into the District Court. It has not, however, done so. It not only has not deprived the State courts of jurisdiction over such causes, but it has provided for their prosecution and defense in those courts by the assignee. The 14th Section of the Bankrupt Act declares that the assignee "may sue for and recover said estate debts and

effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with like effect as they might have been prosecuted or defended by such bankrupt." The 16th Section also provides for the substitution of the assignee as plaintiff, in place of bankrupt. It is true that by the 21st Section, proving a debt or claim by a creditor operates as an abandonment by him of all right to maintain a suit against the bankrupt, or obtain satisfaction for a judgment already rendered. The same section also provides that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined. These two provisions of the 21st Section are addressed as much to the State as to the United States courts. *In re* Rosenberg, 2 N. B. R., 236. There is a further provision in the same section addressed more particularly to the Bankrupt Court, providing for a stay of proceedings in suits upon the application of the bankrupt, until the question of his discharge is settled; provided there is no unreasonable delay on his part. But even here it is provided that by leave of the Court in Bankruptcy, the creditor may proceed to judgment for the purpose of ascertaining the amount due, but execution shall be stayed, as aforesaid. The power of the State courts to proceed with pending suits, in cases where creditors have provable debts, but which they do not prove under the bankruptcy proceedings, under certain prescribed limitations, is thus recognized by the Bankrupt Act itself. The jurisdiction of the State courts is not extinguished, except in those cases where the creditor proves his debt or claim. This very bill proceeds upon this view, and describes the suits of Clark and the Burtons, and the Franklin County Bank, as now pending in the State courts. Congress has not provided that they shall be transferred to the District Court, much less has it provided that the latter tribunal may proceed to determine the subject-matter of the suits pending in the State courts, by issues framed here to be tried by jury or

in any other manner. That part of the prayer of the bill which invokes this mode of relief is therefore denied.

But it by no means follows that the bankrupt and the creditor are to be allowed, on the very eve of the debtor's bankruptcy, to enter into any arrangement by which they can control the course of litigation in the State courts, in suits there pending, to which the bankrupt is a party. The assignee has the right to be substituted as a party in place of the bankrupt, and he may, and in these cases should, exercise that right, and with the aid of counsel enforce and defend the rights of the creditors who have, through him as their representative, succeeded to whatever rights the bankrupt had prior to any truce or agreement which the latter may have entered into with Oscar A. Burton. To this end an injunction must issue against Oscar A. Burton, restraining him from using in any manner the agreement of 18th of February, 1870, and, if necessary, an order will be placed on Clark, requiring him to execute such papers as will enable the assignee to appear in the cases in the State courts. I think, however, that the State courts are bound to admit him as a party in all the suits in place of Clark, on production by him of his appointment as assignee, properly authenticated. Clark may also be enjoined from any further interference with the suits, beyond furnishing the assignee all the information in his possession which may be serviceable in the prosecution, or defense, of the claims in favor of, or against the estate. This relief the court has the power, and it is its duty, to grant.

The object of this agreement between Clark and Burton was to conclude the action of the assignee on material matters touching this litigation, and was thus in fraud of the Bankrupt Act. By suppressing its use the assignee will be left free, and with the same means of attack or defense which he would have had had the agreement never been concluded. The litigation in the State courts will stand where it did before the truce between Clark and Burton, except the discontinuance of the equity suit against Clark and Barlow, and the one Clark *v.* Burton, and the reversal of the judgment of forty-six thousand

dollars in favor of Burton against Clark. These acts have already been consummated, and this court has no power to reverse them. But if it had, I do not see what object the creditors could gain by a restoration of these chancery suits to the docket of the State courts, or what loss can accrue to the estate by their discontinuance, beyond, possibly, a bill of costs. As to the reversal of the judgment of forty-six thousand dollars in favor of Burton, I do not, as I have already intimated, see any just ground of complaint by the assignee on that account, for the bill alleges in effect that that judgment was founded upon a fictitious and fraudulent claim.

But it is insisted that the great object of Oscar A. Burton is to bring his claims against Clark to judgment under the action of book-account, and thus shelter them under the attachment lien in that suit, which cover all of Clark's property, and that this will allow him to thus obtain a preference over the rest of the creditors, and enable him to appropriate all the bankrupt's estate to the payment of his own claims, to the exclusion of all others. It is suggested that he will withdraw his pleas, or specifications in offset, from the action of assumpsit, wherein he has no security, and transfer them to his accounts on book, for adjustment in the book-account action, in which his heavy attachment was levied, and that the suppression of his unlawful agreement with Clark will not prevent this result. But the success of this scheme, as it is termed, must depend upon questions of law over which this court has no control, so far as those suits are concerned. Those actions are under the authority of the State court, which has jurisdiction of the parties and subject-matters, and it must determine the questions as they arise, according to law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by the State tribunals. In no other way can its decision be reversed or revised.

If a clause of the Bankrupt Act is drawn in question and a right or claim set up under it in the State court, it is bound by its authority, and if it disregards it, its judgment can be

reversed. If the rules of law prevailing in Vermont forbid the transfer by Burton of the items once filed by way of offset in the suit in assumpsit, to the book-account action, the Supreme Court of the State will so decide when the plea in abatement already filed reaches them. If such a transfer is in fraud of the Bankrupt Act, though not in conflict with the practice hitherto prevailing in the courts of the State, the Bankrupt Act must prevail as the paramount law, and prevent the transfer. This being a matter which has arisen *puis darrien continuance*, it can still be set up by the assignee in the State court, and if the judgment of the latter be against the rights of the creditors under it, it can be subjected to a writ of error, taking the case from the Supreme Court of the State to the Supreme Court of the United States, the only court which has the power of reversing the final decision of the highest court of the State.

As to the exception taken to the ruling of the State court, recommitting the book-account suit to the auditors for further hearing, this court has nothing to do with that. If that ruling is subject to revision at all, it must be revised by the Supreme Court of the State.

The bill avers that Oscar A. Burton threatens to call out the auditors in the action of book-account and proceed to trial, and that it is necessary that the assignee have more time in order to properly prepare to defend that suit. This is a consideration proper to be addressed to the tribunal before which that cause is pending. The assignee being substituted as a party in place of Clark, free from any of the odium which it is conceded attaches to him, will, as the representative of these innocent creditors, receive such protection and justice as the tribunals of the State of Vermont mete out to all its honest citizens, who resort to them for the enforcement or defense of their rights. That the State court will give this assignee full opportunity to prepare this, and the other cases, before he is required to proceed to trial, I cannot doubt, especially as he holds this large estate for the benefit of numerous *bona fide* creditors, an estate which is involved in a complicated litiga-

tion, and in this condition has just passed out of the hands of a man, whom both parties denounce as a walking embodiment of fraud and villainy, known and read of all men. But it is said that a stay of proceedings can be granted until the question of the debtor's discharge is determined. This claim rests upon the second and third clauses of the 21st Section of the Bankrupt Act. The second clause, as already stated, is addressed as much to the State courts as to those of bankruptcy. It prohibits them from allowing a creditor who holds a provable debt from prosecuting to *final judgment* any suit at law or in equity therefor, against the bankrupt, until the question of the latter's discharge shall have been determined. The third clause is addressed more particularly to the courts of bankruptcy. It provides that the latter shall, upon the application of the bankrupt, stay any such suit until the determination of the question of discharge, provided the debtor does not unreasonably delay in endeavoring to obtain his discharge. This court may also, in its discretion, permit the creditor to proceed to judgment for the purpose of ascertaining the amount due, though execution must be stayed, as aforesaid. These provisions were intended for the protection of the debtors. He has made no application for a stay of proceedings. Still it is obvious, from these clauses of this section of the act, that this court has the power to stay the creditors from proceedings at all in the State court, until the question of discharge is determined. At least this power to stay is conferred by the act in terms. But the question arises whether its exercise is practicable in this case. Under the law, as it now stands, the assets of the estate must pay fifty cents on the dollar, before the general question as to the debtor's right to a discharge can arise, unless a majority in number and value of his creditors proving their debts assent in writing. Whether the assets will reach this point cannot be determined, until the amount due in the suits now pending against him are ascertained. It is true that the debtor's estate is large, amounting to a hundred thousand dollars or more. But it is in proof that in addition to some prior mortgages, the attachments on this property amount to

two hundred and ninety-five thousand one hundred and fifty dollars, and it is a singular fact, that the whole amount of their attachments, except sixteen hundred and fifty dollars, was levied on the property more than four months prior to the filing of the petition in bankruptcy. Some of these attaching creditors have proved their claims, and therefore surrendered their attachments. To what amount this has been done does not appear in the proofs. The claims under the attachments, if valid, appear to be provable debts, but so long as they are not proved, and the attachments thus abandoned, I assume them to be valid liens on the property attached, to the amount justly and legally due.

The amount due on these claims upon which these existing suits are founded cannot be ascertained, except by proof and adjustment in this court, or hearing in the State court. The extent of these debts must be ascertained somewhere before the question of discharge can be passed upon by this court. This court cannot assume the validity or invalidity of these claims, or their extent. To stay the creditors or any one of them having a large claim from proceeding to ascertain the amount due till the question of discharge should be reached, might, and probably would, block the proceedings indefinitely, or until the stay were taken off. But, inasmuch as this court has no power to withdraw the litigation from the State court, to prohibit these defendants from proceeding there to ascertain the amount due, until the question of the debtor's discharge could be reached and passed upon, would not, even if the embarrassments to which I have just referred did not exist, remove the main difficulty which the other creditors are seeking to avoid. In this aspect of the case their object is not merely to delay Oscar A. Burton's proceedings in the State court to ascertain the amount due, until the question of Clark's discharge is settled, but to prevent him from transferring to the action of book-account the items which he has once litigated in the actions of assumpsit. The same difficulty would remain after the question of discharge was disposed of. This question of his right to transfer his account from one action to another,

a mere question of law arising on indisputable facts, would still remain to be determined in that court where the actions are pending, and over the parties and subject-matters of which that court has jurisdiction, so long as Burton refrains from proving his debt here. The only course left for the other creditors to pursue, in order to protect their rights in this particular, is for the assignee to appear in those suits, interpose the objection that the transfer would be in fraud of the Bankrupt Act, have the objection made a part of the record, and, if the decision is against him, remove the case to the Supreme Court of the United States for revision.

Of course, Burton, or any other creditor, can at any time be prohibited from taking out execution in the State court, and levying it upon the property attached. The assignee will have the right to free the estate from the attachment lien or liens, if that course becomes advisable; and this court can protect him in the exercise of that right, and interpose its authority at such time as may be most expedient or proper. It can be done now or hereafter.

I have assumed throughout that the attachments on this bankrupt property, which were levied more than four months prior to the filing of the petition in bankruptcy, were not dissolved by the adjudication, and, except as to those that have been surrendered, are valid liens to the extent of the debts justly due the attaching creditors, and embraced in their suits. Though I do not intend now to formally decide this point, it is difficult for me to see how such a conclusion is to be avoided, in view of the first clause of the 14th Section of the Bankrupt Act (*Park v. Jenness*, 7 How., 612), especially as the latter contained the settled constructions of the Act of 1841, when the present one was enacted.

As to the suits of the Franklin County Bank and Carlos C. Burton, and the suit of Oscar A. Burton for ten thousand dollars, I see nothing, either in the allegations of the bill, or in the proofs adduced on the hearing, calling now for the interference of this court, beyond restraining the plaintiffs therein from proceeding to take out execution on any cause that may

be found due, until the assignee can have reasonable time to discharge the attachment liens, if he shall desire so to do. An injunction against each to that effect can issue now, or at some future time, as may be most expedient.

But I do not fail to appreciate the gravity and importance of the questions involved in this case, both on account of the large interests at stake, and the peculiar embarrassments under which the assignee may labor. And as one or both parties may, and doubtless will, seek a revision of this case in the Circuit Court, I will, in addition to permanent injunction against the use of the agreement between Clark and Oscar A. Burton, of the 18th of February, 1870, grant a stay of proceedings in all the cases referred to in the bill, until the questions involved can be determined in that court.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where a mortgage for four thousand dollars was given, while only one thousand dollars was advanced upon it, and was recorded in full, it is *prima facie* evidence of fraud, and it was therefore

Held, that out of the proceeds of sale of the property seized, the marshal pay over to the petitioning creditors, or their attorneys, the amount of their reasonable costs, expenses, etc., incurred in the proceedings in this matter, and that the balance be paid over to the mortgagee.

In re Edward Dumont.

The property seized in this case consisted of a stock of millinery goods, and was covered by a mortgage to Dahmer for four thousand dollars; upon which Dahmer claims one thousand dollars, and interest at eight per cent. per annum from November, 1868. The goods were seized January 29, 1869; and February 13, 1869, were ordered to be sold by the marshal as perishable property, and were sold accordingly. On the sale the goods only brought eight hundred and thirty-three dollars and sixty-six cents, not enough to pay the amount claimed by Dahmer on his mortgage. There are no other assets; and conceding the mortgage to be valid, the question now is, whether

the petitioning creditors shall be reimbursed out of the proceeds of the sale for their costs and expenses of the bankruptcy proceedings.

Costs in bankruptcy are left by the act entirely in the discretion of the court, and questions arising in relation to them must be disposed of upon equitable principles.

This matter came before the court in March last, upon the petition and answer above, and it was then held that the right of the petitioning creditors to be reimbursed for their costs, out of the fund arising from the sale of the goods, would depend upon the question whether they had probable cause to take and prosecute their proceedings in bankruptcy, as against the rights of the mortgagee. It cannot be denied, upon authority, as well as principle, that if the mortgagee allowed the mortgaged property to be so used and managed, and the mortgage itself to be placed, and continued, upon the records in a condition to induce in the minds of reasonable men a suspicion or belief that the mortgage was intended as a mere cover to protect the property of the mortgagor from his creditors, and the creditors having acted upon such suspicion or belief, the creditors should be reimbursed their costs and expenses out of the mortgage fund, notwithstanding the mortgage is eventually held to be valid, there being no other assets. (See Reaf on Wills, 493–495 ; 1 J. Ch. R., 153 ; 6 Vesey, 349.)

At the hearing in March it was referred to the Register to take proofs as to such probable cause, and the question is now to be disposed of upon the proofs taken.

The question now is, not whether the mortgage was actually fraudulent and void as against creditors, but whether the creditors had reasonable cause to believe it to be so? Was there reasonable ground for suspicion as to its *bona fides?*—such ground as a man of ordinary intelligence, exercising ordinary care and diligence, would be justified in acting upon?

The proofs show that the mortgage was given for four thousand dollars, while only one thousand dollars was advanced upon it. How this came to be done is satisfactorily explained as far as the mortgagee is concerned ; but the fact remains that

the mortgage was placed upon the public records, without any explanation concerning it to show that it was an incumbrance upon the debtor's property for only a fourth of what it appeared to be on its face. In this form it was notice to all the world that the mortgagee claimed an incumbrance on the debtor's property of four thousand dollars. It does not matter that only one thousand dollars is claimed. It was permitted by the mortgagee to appear to be a claim for the larger amount. Such exaggerated incumbrance is *prima facie* fraudulent as against the creditors of the mortgagor. (See 4 Blatch., C. C. R., 28.)

It would have been a very easy matter for the mortgagor to have indorsed upon the mortgage a statement of the facts, so that it would not appear to be more than it actually was, and he should have done so. Having omitted this precaution, he cannot complain that others have acted upon his omission and taken his mortgage for what it appeared on its face to be—a fraud upon the creditors of the mortgagor.

This one circumstance is sufficient alone to dispose of this question of costs in favor of the creditors. But there are numerous other appearances of fraud in the future conduct of the parties in relation to the mortgaged property, each of which was sufficient to justify the creditors in proceeding as they did in relation to it; such as the stock remaining in the hands of the mortgagor a considerable time after the maturity of the mortgage; the amount of stock being at the same time rapidly reduced and no payments made upon the mortgage debt; no efforts being made by the mortgagee to take possession of, and sell the goods under the mortgage until creditors became pressing and attachments were imminent.

It is unnecessary to consider in this case the question of the right of creditors, proceeding against their debtor in bankruptcy, to cause mortgaged property to be seized and sold in any case where there are no other assets, and I therefore express no opinion upon that point. The creditors were clearly justified in proceeding as they did in this case, for the reasons above stated, and are entitled to be reimbursed for their reasonable costs and expenses, out of the funds arising from the sale of the property seized.

Let an order be entered directing the marshal, out of the proceeds of the sale of the property seized in this case, to pay over to the petitioning creditors, or their attorneys, the amount of their reasonable costs, expenses, and disbursements paid or incurred by them in the proceedings in this matter, including the said sale, upon presentation to him of a taxed bill of the same, and take a receipt therefor, and that he pay over to George Dahmer, as mortgagee of said goods, or his attorney, the balance which shall remain after paying such costs and expenses aforesaid, and take a receipt therefor, and file all receipts taken by him, in pursuance of said order, with the clerk of this court, together with a full report of his doing in the premises from and including the said sale.

H. B. Brown, for the creditors.

L. Bishop, for George Dahmer.

SUPREME COURT—MAINE.

1. The assignment of a bankrupt's estate, under Section 14, United States Bankrupt Act of 1867, does not dissolve an attachment of his estate made more than four months prior to the commencement of his proceedings in bankruptcy.
2. When the officer's return shows that an attachment was made more than four months prior to the defendant's commencement of proceedings in bankruptcy, the plaintiff is entitled to a judgment, to be satisfied out of the *specific* property returned upon the writ.

JOSEPH J. BOWMAN *v.* LEANDER D. HARDING.

ASSUMPSIT by an indorsee against the maker of a negotiable promissory note.

The writ is dated August 27, 1867. It appears by the officer's return, dated September 2, 1867, that he attached a horse, harness and three carriages, described and valued in the aggregate at the sum of four hundred and twenty dollars, and that service was completed on the following day. The action was duly entered and continued from term to term until the March term, 1869, when the defendant pleaded his discharge in bankruptcy, dated February 24, 1869, granted on his petition to be declared a bankrupt, filed February 26, 1868.

There was evidence tending to show that the officer did not take the property returned as attached out of the defendant's possession; that the defendant got a receiptor at the suggestion of the officer; that the defendant had other horses, which he selected as exempt from attachment; that the receiptor was accepted by the officer, and the receiptor never attempted to control the property and never had possession of it. A copy of the receipt was put into the case.

If, upon so much of the testimony as was admissible, the plaintiff would be entitled to a special judgment for the property attached, the action was to stand for trial.

S. D. Lindsey, for the plaintiff.

J. H. Webster, for the defendant.

United States Bankrupt Act of 1867, Section 14, saves the lien only by implication. The discharge releases the bankrupt from all "debts, claims, liabilities, and demands which were or might have been proved against the estate." No other limitation by positive provision or implication in the act. The discharge is a judgment of a court having jurisdiction, and cannot be impeached collaterally. *Potter* v. *Webb*, 2 Maine, 257; *Pierce* v. *Irish*, 31 Maine, 254; *Clark* v. *Pishon*, 31 Maine, 503; *Thompson* v. *Tolmie*, 2 Peters, 157. No judgment can now be rendered against the defendant, the basis of which is a "claim or demand" from which he has been released.

The object of the act is to put all creditors upon the same level. Sections 14 and 35 should be made to harmonize, and reconciled with the general scope of the act. There are several classes of cases in which actions may be prosecuted to final judgment, notwithstanding the discharge. If attachment, in one of the excepted cases, be made more than four months prior to proceedings in bankruptcy, it might be saved by the implication in Section 14. By limiting the implication to that class of cases not barred by the discharge, full effect would be given to Section 14, and it would harmonize with Section 34.

Appleton, C. J.—By the Bankrupt Law of 1867, C. 176,

Section 14, it is provided that, as soon as an assignee is appointed and qualified, "the judge, or when there is no opposing interest, the Register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on *mesne process* as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of proceedings."

"Any such attachment" is one made within four months next preceding the commencement of proceedings in bankruptcy. It is dissolved by virtue of Section 14, but no other and earlier attachment is thereby dissolved. Not being dissolved, it remains in full force. The attachments within four months being dissolved, the property attached rests in the assignee. When the attachments are made prior to that time, the debtor's title to the property attached passes to the assignee, subject to the creditor's lien acquired by virtue of such attachment.

In the present case the lien is not dissolved by the proceedings in bankruptcy. The plaintiff, therefore, claims that judgment be rendered against the property attached, *Kittrige* v. *Warren*, 14 N. H., 509; *Peck* v. *Jenness*, 7 How., 612.

But it is urged that there was no valid attachment, or if there was one, it has been dissolved by the act of the officer, and the defendant claims to show those facts by proofs *ab extra*. But this cannot be done. The officer is bound by his return. That shows an attachment, and consequently a lien upon the property attached. The plaintiff is entitled to the judgment against the property thus shown to be attached. If this property is destroyed or the attachment dissolved in any way without fault on the part of the officer, those questions are to be hereafter determined. In the present position of the case they are not before us for adjudication.

The return of the officer shows an attachment, and consequently a lien upon the property attached. The plaintiff is entitled upon the record to a judgment against the specific property returned upon the writ. Whether there was an attachment, or whether, being one, it has been dissolved, are questions which we are not now called upon to decide.

Kent, Walton, Barrows, Danforth, and Tapley, JJ., concurred.

UNITED STATES CIRCUIT COURT—VIRGINIA

A deed of trust executed December 8th, 1866, by a bankrupt who did not file his petition till June 8th, 1867, was not recorded until March 2, 1867.

Held, that the recording (which was within four months previous to the commencement of bankruptcy proceedings) was not an act of bankruptcy, for the deed was operative from its date, and the act of the creditors in recording it, cannot be construed as the act of the bankrupt.

If the beneficiaries in a conveyance or mortgage are satisfied with the security offered by the instrument unrecorded, there is neither necessity nor obligation to record it.

The recording is only necessary to make an instrument valid against creditors under State laws, and the Bankrupt Act recognizes and respects such validity if it be prior to bankruptcy proceedings.

Where under State laws the landlord has a lien for rent, the same will be upheld and respected in a bankruptcy court, and the assignee must take title subject thereto. The landlord will be entitled to prove his claim in bankruptcy for the unexpired term of a lease beyond one year, even though he has been preferred under a State law, for his rent up to the end of the year.

A mortgage or other conveyance made as security for a debt evinced by a note or bond, will be upheld as a security for the same continuing debt, though the evidence of it may be changed by renewal or otherwise, but where the security is changed the same will not be.

The assignee takes the property of the bankrupt "in the same plight in which it was held by the bankrupt when his petition was filed."

The assignee represents the creditors' rights as well as those of the bankrupt, and any incumbrance which would be void as against creditors, would be void as against him.

In re Charles H. Wynne—*Involuntary.*

Chase, C. J.—The question in this case arises upon a petition of John Johns, Jr., assignee of Charles H. Wynne, an involuntary bankrupt, who asks for instructions as to the order of payment of claims against bankrupt's estate. Wynne was

adjudicated a bankrupt on the petition of Wheelwright, Mudge & Co., filed in the District Court of the United States for the District of Virginia, on the 8th of June, 1867.

Paine, E. & Williams, claimed to be preferred in payment, under a deed of trust dated August, 1866, which was never recorded; or, if that claim be disallowed, then under a deed of trust dated December 8, 1866, recorded March 2, 1867.

Haxall & Co. also insist on preference upon the ground that Wynne was tenant under them of the warehouse which he occupied, and that under the law of Virginia, they, as landlords, had a lien for the rent due at the date of the petition; to enforce which, on the 10th of June, 1867, they sued out a distress warrant for two thousand one hundred and twenty dollars, the amount of rent then due, and caused the same to be levied on the goods then on the premises; and subsequently, on the 18th of July, 1867, sued out an attachment, which was levied the same day upon the same goods, for fifteen hundred dollars, the amount of rent to become due on the 1st of December, 1867.

We will consider the claim to preference in payment advanced in behalf of Paine E. & Williams, and we must say at once that so far as this claim is founded on the deed of August, 1866, it cannot be admitted. It is doubtless true that a mortgage, or other conveyance, made as security for a debt evinced by a note, or bond, will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise. *Winsor* v. *McClellan*, 2 Story, 495. But in this case it is the security itself which has been changed, and not the evidence of the debt. The deed of December 8, 1866, was executed, it seems, in substitution for that of August, which thereupon ceased to have any validity or effect.

The only question now to be determined is, therefore, whether or not the deed of December created a lien upon the property described in it, which the assignee of the bankrupt must satisfy before applying any of its proceeds to the claims of the general creditors. And it is to be observed that the deed is not condemned by the 35th Section of the Bankrupt

Act, which avoids all assignments and other modes of preference made, or attempted, by insolvents, or persons in contemplation of insolvency, within four months before the filing of the petition in bankruptcy, or, in case the person to be benefited has notice of the intent, within six months before such filing. The deed in question was not made within either limit of time. It need not, therefore, be here considered whether either period could begin to run till after the passage of the act. If the deed is to be treated as void or inoperative as against the assignee by operation of the act, it must be because of the effect of that clause of the 14th Section which provides "that all the property conveyed by the bankrupt in fraud of his creditors shall, in virtue of the adjudication of bankruptcy and the appointment of the assignee, be at once vested in such assignee."

We do not doubt that the assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed (*Bradshaw, assignee*, v. *Klein*, 1 N. B. R., 542), subject to such liens, or incumbrances, as would affect it if no adjudication in bankruptcy had taken place; but it is to be remembered that the assignee represents the rights of creditors, as well as the right of the bankrupt; and that any lien, or incumbrance, which would be void for fraud as against creditors if no petition had been filed, or assignee appointed, will be equally void as against the general creditors represented by the assignee. *In re* Richardson, 2 Story, 521; *in re Carr* v. *Hilton*, 7 Cur., 230.

This is what the act means when it vests in the assignee "all property conveyed in fraud of creditors." It does not make any conveyance or incumbrance fraudulent. It simply clothes the assignee with the entire title, notwithstanding such conveyance, or incumbrance, and makes it his duty to invoke the proper jurisdiction to annul the fraudulent proceedings.

And it may be remarked further that, except to this extent, the Bankrupt Act has no influence upon this case so far as the deed of trust is concerned.

Much was said in argument concerning the effect of the

record of this deed upon the 2d of March, 1867; and it was strenuously urged that the deed was avoided by the effect of the act which purports to have been approved on that day. But we entirely concur with Mr. Justice Story in thinking that, where the question is as to the effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into. *Gardner* v. *Collector*, 6 Wall., 511. And in this we think ourselves warranted also by the reasoning of the Supreme Court. Senate Journal, 2d Sess., 39th Cong., 1866–'67, pp. 432–458.

Now, it is in proof that the deed of trust was recorded about 4 P. M., on the 2d day of March, 1867; and it appears from the Senate journal of the session during which the act was passed that the day denominated the 2d day of March in the journal, and in the approval of the statute by the President, consisted in fact, of Saturday the 2d day of March, of Sunday the 3d, and of Monday the 4th until noon; and it appears further that the bill, which afterwards became the Bankrupt Law, was not enrolled and delivered to the proper committee to be presented to the President for his signature, until after the recess, which ended at 7.30 P. M. on Sunday, and was not reported to the Senate as actually signed by the President until after 9.40 A. M. on Monday. Revised Code, 1860, p. 566, Section 5. See *Windsor* v. *Kendall*, 3 Story, 515.

It cannot be doubted, then, that the deed of trust was in fact recorded nearly two days before the bankrupt bill became a law; and we think ourselves not only warranted on general principles, but bound by the Constitution, to notice the fact thus appearing upon the public records.

It may well be questioned, indeed, whether, if the act had been approved before the recording of the deed, the effect of the latter would have been altered. Nothing in the 35th Section touches the deed; and nothing in any other except the 14th. It may be, and we think it is true, that if the deed had remained unrecorded, when the petition in bankruptcy was filed, the title of the assignee would have prevailed against any

claim under the deed; for the assignee represents the creditors, and the statute of Virginia expressly declares "any deed of trust void as to creditors" until and except from the time it is duly admitted to record. It is not an unreasonable construction of the Bankrupt Act, as we think, which regards it as vesting in the assignee, for the benefit of creditors in general, the estate of the bankrupt, discharged of liens or trusts which, at the time of the petition, are valid and *inter parties* under the statute of the State in which they are claimed to exist. But we do not see how the mere enactment of the law could affect a deed previously executed.

It is not, however, necessary to consider these points here. The important question in the case is whether, under the 14th Section of the Bankrupt Act, this deed must be regarded as inoperative against the assignee. The counsel for the assignee has argued with much earnestness, that the deed cannot be sustained without disregarding the implied effect of the first clause of the second general proviso of that section: "That no mortgage of any vessel, or of any goods and chattels, made as security for any debt, or debts, in good faith and for a present consideration, and otherwise valid and duly recorded pursuant to any statute of the United States, or of any State, shall be invalidated or affected hereby."

The argument is that all mortgages, not expressly saved from the operation of the act by this clause, must be held invalid; and, therefore, that all deeds of trust and other conveyances, intended as security for debts, and not within the description of the mortgages expressly saved, must also be invalid.

But we cannot adopt this reasoning. It would be going too far, we think, to hold all mortgages not included by the terms of the description to be invalidated by the act. The clause expressly saves certain mortgages, but it says nothing as to others. Much less does it say anything as to deeds of trust, or conveyances of analogous character. It leaves all deeds and instruments of writing not expressly saved, to the general principles of jurisprudence. To hold otherwise would, we think,

be to give to the act an *ex post facto* operation contrary to the intent of Congress.

And it would be quite gratuitous so to hold; for the rights of creditors, as against all instruments not described in this clause, are fully protected by that which stands next in the section, and vests in the assignee for their benefit all the property conveyed by the bankrupt in fraud of his creditors.

The next question in this case, therefore, is, whether the deed of trust by which the several liabilities of Enders, Paine & Williams, for Wynne, were secured, was made in fraud of the creditors of Wynne.

It has been argued that the deed of trust took effect as against creditors only on the 2d day of March, 1867, and that the recording of the deed on that day was itself an act of bankruptcy. To maintain this proposition it is necessary to show that the recording of the deed was the act of Wynne. But clearly it was no act of his. The deed as against him was operative from its date. It was then that all his interest in the property described in it became vested by way of security in the trustee. It was then that he delivered the deed and parted with all control of it. If the beneficiaries were satisfied with the security afforded by the deed unrecorded there was neither necessity nor obligation to record it. To record it was only necessary to make it a valid security against other creditors; and it was not for Wynne, but for the creditors secured by the deed, to determine whether it should be recorded or not. The delivery of it for record was in no sense his act, but theirs. In no sense, therefore, can it be regarded as an act of bankruptcy.

But it has been argued that as against creditors it must be regarded as a deed executed at the date of the record, and therefore as a deed creating a preference on that day, which was within four months of the filing of the petition. There is ingenuity and apparent force in this argument. But we think there are decisive answers to it. In the first place, the preference which the law condemns is a preference made within the limited time by the bankrupt, not a priority lawfully gained by creditors; and we have just shown that the preference gained

by the record was not a preference made by the bankrupt. And, in the second place, the law which makes deeds of trust void "until and except from" the time of record, clearly makes them valid at and from that time. And it is as much the policy of the Bankrupt Act to uphold liens and trusts when valid as it is to set them aside when invalid.

It is hardly necessary to add that this must be especially true of a trust deed created and recorded before the approval of the Bankrupt Act.

Was there any actual fraud in giving or taking the security created by the deed of trust? There has been no attempt to maintain this.

It has been said that Enders, Paine & Williams, on the 8th of December, 1866, knew that Wynne was insolvent, but it is not denied that they had a right to obtain, if they could, preference in payment under the laws of Virginia. They could obtain it by direct transfer of property by deed of trust, by judgment and execution. Until after the passage of the Bankrupt Act nothing but fraud in obtaining the preference could invalidate it, in whatever mode obtained.

It is not necessary to insist on this in the case before us, for we do not think that the evidence establishes as matter of fact that at the date of the deed or at the date of the record Enders, Paine & Williams, were aware of the actual insolvency of Wynne. They knew, indeed, that he was embarrassed in carrying on his printing and publishing business, but they seem to have fully believed that his property was more than sufficient to pay all his debts.

On the whole we are of the opinion that the deed of trust must be supported as a valid deed, and that the creditors named in it are entitled to be paid out of the proceeds of the property embraced in it.

The remaining question to be considered is, whether, at the time of the filing of the petition in bankruptcy, Haxall & Co. had any lien for rent upon the property of the bankrupt.

This is the same property which was conveyed by the deed of trust, and the solution of the question just stated may be

affected in some measure by the conclusion to which we have come in respect to the validity of the lien created by that deed.

And in considering the question now to be disposed of, we may lay out of view the proceeding by distress-warrant and also the proceeding by attachment. As we understand the Bankrupt Act, all the rights and all the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the act, he may hold, under whatever title, whether legal or equitable, and however encumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a State court commenced after petition is filed, though in cases where jurisdiction has been previously acquired by State courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested. *Peck* v. *Tennessee*, 7 How., 612.

Whether, therefore, the distress-warrant, or the attachment, be regarded as a proceeding for obtaining or enforcing a lien, each was equally unwarranted. *Buckley* v. *Snouffer*, 1 Md. Rep., 149. If a lien for rent existed, it was a lien to be discharged by the assignee, and enforced in the United States Court of Bankruptcy. If it did not exist, it could not be brought into existence by any proceeding whatever.

The real question is, were the goods on the premises demised to the bankrupt subject to a lien for rent under the State law when the petition was filed, independently of any proceeding by distress or attachment?

Liens are of various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of

this sort is given by the 12th Section of Title 41, Chapter 128 of the revised Code of Virginia, adopted in 1860. It expressly prohibits any person having, by deed of trust, mortgage, or otherwise, a lien upon goods of a tenant on demised premises from removing such goods, without paying to the landlord the rent due, and securing the rent becoming due, not exceeding altogether one year's rent; and it further requires any officer who may take such goods under legal process to pay out of the proceeds the rent in arrear, and deliver to the landlord sufficient purchasers' bonds for the payment of that becoming due. We cannot doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character. We have no concern with the policy of this legislation; it is upon the statute book, and the lien it creates must be respected and enforced.

The validity of the deed of trust in this case seems to us clear, and it is not doubted by any one that in the absence of the special circumstance supposed to affect it with invalidity, the lien of the creditors secured by it would be perfect. But these creditors, by no process whatever, could appropriate these goods to the satisfaction of their debts without paying or securing the year's rent; and so of process under execution. The officer of the law, at his peril, must pay the rent out of the proceeds. Would it not be trifling with the plain sense of words to say that there is a lien under the trust deed and a lien under the execution, but the claim which by law is made superior to either as a charge upon the goods is no lien? We hold in this case that the creditors in the trust have a lien. How can we hold that the landlord, whose claim under the law is superior to theirs, has no lien?

It seems to us, therefore, that Haxall & Co. had a valid lien for the arrears of rent due, and for so much rent to become due under the case, as will make the whole amount secured equal to a year's rent. And we think that this lien is given by the statute independently of proceedings by distress-warrant or attachment, which we regard as remedies superseded by the effect and operation of the Bankrupt Act. *In re* Pulver, 1 N. B. R., 147.

In this case we do not pass upon the claims of Haxall & Co., upon the assignee for rent, beyond the year during which the lien for the rent is given. We are inclined to think that he was entitled to the occupancy during the unexpired term; and that for the rent becoming due during that period Haxall & Co. would be entitled to prove their claim against the bankrupt as general creditors.

The decree of the District Court will be reversed and a decree entered in conformity with the principles of this opinion.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

If the assignee in bankruptcy elects to accept a lease held by the bankrupt, he renders himself liable on behalf of the estate, for rent from the date of the petition.

In re LAURIE, BLOOD & HAMMOND.

LOWELL, J.—The bankrupt firm hired a large and valuable store of the petitioners, paying rent quarterly; and they paid the rent falling due January 1, 1869. On the 8th of January a creditor's petition was filed against them, but owing to negotiations for a settlement they were not adjudged bankrupts until March 26. The assignees paid rent from the last mentioned day, for two or three months, while they were disposing of the goods, and the petitioners allege, as matter of law, that the assignees are bound to pay from the date of the petition, and not merely from the adjudication.

An assignee in bankruptcy, unless restrained by the terms of the lease itself, may adopt or reject a lease on behalf of the estate as he finds most beneficial for the creditors, and can take a reasonable time for decision. In a case like this, where the rent is very large, a speedy decision would be demanded.

If the assignee takes the lease, he makes himself liable, on behalf of the estate, for the rent, including, certainly, that of the current quarter, and this he must consider in determining to take or reject the term.

Under the provisions of this lease, the petitioners had a right of re-entry if the lessees should be declared bankrupt; but this right was not exercised, and an arrangement appears to have been arrived at by which the assignees occupied for a certain time, and paid for that time, without adjusting the rent of the current quarter, but leaving that matter open, perhaps for future negotiation. The petitioners might well have insisted that if the assignees retained possession on and after April 1st, they should pay the rent due on that day; and though they neglected to stipulate for this, I consider it to be fairly implied.

Taking the lease, they took it with its existing terms, one of which was to pay the quarter's rent on quarter-day, they must be understood to have decided that it was better for the estate to assume this expense, than to remove the goods and make sale of them elsewhere.

Another consideration which applies with even greater force to this particular case is, that the assignees, as representatives of the estate, have, in theory of law, been in possession from the day the petition was filed; and have therefore, in theory, had the benefit of the occupation from that time, and not merely from the adjudication, which is only a finding that the petition is sustained; if the assignees are to pay rent there is no reason for taking the adjudication which does not equally apply to the earlier date.

If the quarter-day has passed before the adjudication, though after the petition, and the bankrupts, acting in good faith and for the benefit of the creditors, had paid the rent in order to prevent an ejectment, this expense must have been held to be a proper one, which the assignees should allow against the assets. I have in some cases, on application for that purpose, authorized such a payment to be made before adjudication, where it appeared to be necessary. This is such a case, and I therefore grant the prayer of the petition that the rent from January 8th to March 26th, be paid by the assignees out of the funds in their hands. I find a case of Judge Blatchford's reported, though briefly, in which the assignees were required to pay rent from the date of the petition, *in re* Merrifield, 3 N.

B. R., 98. I do not know that there was anything in that case to distinguish the date of the petition from that of adjudication, but if assignees are to pay only for their own actual occupancy the rent would begin after the assignment, which is always and necessarily some weeks later than the adjudication, because the first meeting must be notified and held for the choice of assignees, which takes time, so that the case decides the same point of law as is raised here. Petition granted.

E. Avery and *G. M. Hobbs*, for petitioners.

B. F. Brooks, for assignee.

UNITED STATES DISTRICT COURT—MAINE.

Where a creditor petitions that debts proved by respondents, who are also creditors, be disallowed, on the ground of having taken a mortgage to secure their debts within four months of adjudication,

***Held*, debts of respondents disallowed.**

GEORGE G. PHELPS *v.* S. P. STERNS. SAME *v.* SMITH DUDLEY.

FOX, J.—These two cases were petitions by Phelps, a creditor of the estate of William H. Porter, of Paris, a bankrupt, against the respondents, who were also creditors of Porter, praying that the debts proved by respondents against the estate of Porter be disallowed. Respondents were creditors of Porter, and March 29, 1869, took a mortgage of Porter's farm to secure their debt. Within four months thereafter Porter was adjudged a bankrupt on petition of Phelps. In August, 1869, the assignee of Porter brought a suit against respondents to break their mortgage; after that suit respondents, before a trial was had, voluntarily released their mortgage and all claims under it to the assignee, and that suit was dismissed; respondents proved their debts against the estate of Porter, and petitioner asks to have them disallowed by reason of this mortgage, alleging it to be a preference in fraud of the Bankrupt Act. Debts of respondents disallowed.

J. O'Donnell, for libellant.

UNITED STATES DISTRICT COURT—MICHIGAN.

Where assignee of bankrupt filed a petition, alleging that bankrupt, within six months of his bankruptcy, etc., conveyed certain real estate to C. M. Rogers, valued at about nine thousand dollars, and two promissory notes, with intent to defeat the provisions of the Bankrupt Act, prays for an injunction to set aside said conveyance, etc. Counsel for C. M. Rogers object that the proper remedy is by bill in equity, and not by petition.

Held, objections overruled, and assignee allowed to proceed upon his petition.

In re JAMES W. NORRIS.

PHILIP H. EMMERSON, assignee of James W. Norris, bankrupt, has filed his petition in this court, alleging that said James W. Norris, within six months before the petition for adjudication of bankruptcy was filed against him, and in the month of November, 1869, he being then insolvent, and in contemplation of bankruptcy, did sell, and cause to be conveyed and delivered to Charlotte M. Rogers, certain real estate in the city of Battle Creek, in this district, valued at about nine thousand dollars, and two certain promissory notes, with a view to prevent the same from coming to the assignee in bankruptcy of said Norris, and to evade the provisions of the Bankrupt Act, and to delay the operation and effect thereof; the said Charlotte M. Rogers having reasonable cause to believe that said Norris was insolvent, and that said sale and conveyance was made by said Norris in contemplation of bankruptcy, and with the view aforesaid; and praying for injunction, and for a decree setting aside the said conveyance; and that the said Charlotte M. Rogers convey and release to the said assignee, the real estate so conveyed, and deliver to him the said promissory notes.

An injunction was allowed, and an order was made and served, requiring the said Charlotte M. Rogers to show cause why the relief prayed should not be granted. The said Charlotte M. Rogers now appears by her counsel, and objects to the proceedings, on the ground that petition is not the proper remedy, and contends that the proper remedy is by bill in equity.

Moore & Griffin, for petitioner.

Hughes and *Russell*, for respondent.

LONGYEAR, J.—By Section 1 of the Bankrupt Act, the District Courts are constituted "Courts of Bankruptcy," with certain general and specific powers and jurisdiction. Courts of bankruptcy, as they existed in England at the time the act was passed, were, and still are separate, distinct organizations, with powers and jurisdiction separate and distinct from all other courts, and it is undoubtedly in this sense that the words are used in the act; that is, courts possessing power and jurisdiction peculiar to themselves. The only difference is that here, instead of creating a new organization, an organization already existing, known as the District Court, is taken up and made use of in lieu of such new organization. But the District Court, when acting as a court of bankruptcy, is none the less a separate and distinct court, and exercising powers and jurisdiction separate and distinct from its powers and jurisdiction as District Court, than if it were such separate and distinct organization.

The general jurisdiction conferred upon the Court of Bankruptcy is of "all matters and proceedings in bankruptcy;" and it is further specifically provided (Section 1), that such jurisdiction shall extend, among other things, "to the collection of all the assets of the bankrupt," and "to the adjustment of the various priorities and conflicting interests of all parties." It is clear from the provision, and in fact it was conceded by counsel upon the argument, that the Court of Bankruptcy has jurisdiction in the premises. By what right can this court, sitting as a Court of Bankruptcy, refuse to entertain and exercise that jurisdiction when it is invoked? It is said that by Section 2, jurisdiction is conferred on the Circuit and District Courts, of suits at law or in equity in such cases, and that it was evidently contemplated that such course should be pursued. No doubt a party may pursue either course he may choose; but again, it is asked, by what power or authority can a party be *required* to pursue the one course or the other? The jurisdiction and powers of each of these three courts, the Circuit, the District, and the Bankruptcy Court, are in this respect equal and co-extensive, and the Bankruptcy Court has no more right to say to a party invoking the exercise of its jurisdiction,

"You must reform your proceedings, and seek your remedy in the District or Circuit Court," than the District Court would have to say to a party commencing his suit there, "You must go into the Bankruptcy or the Circuit Court," or the Circuit Court to say to him, "You must go into either of the other two." Much more might be said in this direction, which will be readily suggested to the mind of the thoughtful student, but I will not pursue the argument further. Neither will I assume to answer the objections raised to this course of procedure, that it is summary in its character, and that it is novel and inconvenient in practice. These objections have been answered so completely in the full, able, and exhaustive opinion of Judge Swayne, of this circuit, *in re* John C. Neal, 2 N. B. R., 241, that it would be mere presumption on my part to attempt to add anything thereto.

The leading opinion in support of the opposite doctrine (that the remedy in a case like the present should be by a suit at law or in equity in the District or Circuit Court), is that of Judge Nelson, *in re* Kerosene Oil Co., 3 N. B. R., 125. With all deference to the acknowledged learning and ability of that eminent jurist, that opinion bears evidence upon its face that it was not well considered. The argument and the conclusion are entirely unsatisfactory to my mind, particularly that portion of the argument in which he says, "It is by no means clear that an appeal would lie from a decision of the District Court to the Circuit Court, under the 8th section, in the summary proceedings in the present case." It is conceded that an appeal would not lie in such a case under the 8th Section. The learned judge, however, seems to have entirely overlooked the 2d Section, in which full provision is made for a review in such cases by the Circuit Court, as is clearly shown in the opinion of Chief Justice Chase, *in re* Alexander, 3 N. B. R., 29.

Aside, however, from the views entertained by me individually, in favor of the right and propriety of proceedings in a case like the present by petition summarily, in the Court of Bankruptcy, as is here done, it is to be observed that it is im-

portant that there should be as great uniformity as practicable in the manner of proceeding in the several courts; and inasmuch as the question has already been adjudicated in favor of the right to proceed in this manner by one of the presiding judges of the court before which the question raised in this case may be reviewed, I should feel it my duty, from considerations of a practical nature, if no other, to decide the question in conformity to that adjudication, even if I entertained serious doubt (which I do not) of its correctness.

In this case the petition is presented in the same court in which the bankruptcy proceedings are pending, and this opinion is, of course, limited to such a case. The objection and motion are overruled, and the assignee is allowed to proceed upon his petition.

UNITED STATES DISTRICT COURT—VIRGINIA.

Where assignees apply to court for an order to examine a lien creditor who had obtained judgment against Ira Hurt, one of the bankrupts, for four thousand three hundred and sixty-two dollars and fifty-one cents, and against Walter C. Calloway, the other bankrupt, for four thousand two hundred and fifty dollars and fifteen cents, alleging usury on the part of Calloway.

In re Hurt, the lien creditor refused to be examined, through advice of his counsel, and submitted to the court the following questions:

Is it competent for the District Court to go behind the judgment of the State court, and inquire into the consideration of the debt upon which the judgment is founded?

The facts disputed were: Usury in the consideration of the debt—ability and opportunity of the bankrupt to plead to action at law in the State court—his mental condition at the time the process was served, and at the date of the judgment obtained against him.

Held, the lien creditor should have produced evidence satisfactory to the Register, or answered the questions of the assignee in relation to his asserted lien against the estate of the bankrupt.

In view of the alleged insanity of the bankrupt, a writ, *coram nobis*, in the court where the judgment was rendered would be the proper mode of redress; the jurisdiction of this court will then attach to the whole subject.

In re Calloway, the lien creditor again refused to be examined—the same questions were certified to the court, and it was admitted that the judgment was rendered upon a plea of usury.

Held, the creditor was right in refusing to be examined in relation to a question of usury upon the debt for which the judgment was rendered.

Where the assignees, by their counsel, moved to strike out proofs filed in

each of said cases, and the motion was objected to by attorney for lien creditor,

Held, the proofs having been admitted to file, and appear in form, and since they distinctly assert and claim a lien, although against the *entire* estates of the several bankrupts, the real lien is not thereby vitiated.

The *informality* in the proofs objected to does not avail, for the reason, the witness has sworn positively, of his own knowledge.

McKinsey & Brown, *assignees of* Ira Hurt, Senr., & Walter C. Calloway, *v.* Dr. John B. Harding.

Hurt & Calloway filed their petition in bankruptcy, in Lynchburg, in 1868, and were duly adjudicated bankrupts. McKinsey & Brown, of Danville, were appointed assignees, and in the course of the proceedings in this case, these assignees applied to the court for an order to have Dr. Harding examined before the Register, in Lynchburg, under the following circumstances:

On the 9th November, 1865, Harding obtained a judgment in the Circuit Court of Roanoke county, against Hurt, upon which he proved a debt against this bankrupt's estate for four thousand three hundred and sixty-two dollars and fifty-one cents, the defendant having waived his plea previously plead *that he had well and truly paid the debt.* Again, on 3d September, 1866, the said Harding obtained the verdict of a jury in the said Circuit Court of Roanoke, against Calloway, for the sum of four thousand two hundred and fifty dollars and fifteen cents, which he also proved against said Calloway's estate—in both cases principal, interest, and expense are included.

The object of the assignees' proceeding was to revive a charge which had been got up by Hurt & Calloway in the State court, of usury on the part of Calloway, but as the salient points of the case are fully elucidated in the Register's reports and opinions, as also in the pleas of the counsel, we give them entire, this being the first case in which this question (of usury) in connection with State court judgments, has been before the District Court in bankruptcy.

In re Ira Hurt, Senr.

At Lynchburg, in said district, on the 15th June, 1869, be-

fore me, John F. Cobbs, one of the Registers of said court in bankruptcy, upon an order in said matter heretofore made and entered, for the examination of John B. Harding *et al.*

Present: *L. D. Haymond, Esq.*, attorney for assignees; *Andrew Rutherglen, Esq.*, attorney for J. B. Harding, creditor, etc.:

The said John B. Harding personally appeared before me, at the time and place designated in said order, and through advice of his counsel refused to be examined in relation to a judgment obtained by him against the bankrupt, prior to the commencement of the proceedings in bankruptcy:

First. Because a question of law and fact has been raised in these proceedings.

Second. Because, until the decision of the court has been obtained, it is incompetent to proceed with the evidence sought to be had, and desires these questions to be certified to the court, which are herewith submitted accordingly.

The following are the questions:

First. Is it competent for the District Court to go behind the judgment of the State court, and inquire into the consideration of the debt upon which the judgment is founded?

Second. The questions of facts. Usury in the consideration of the debt—ability and opportunity of the bankrupt to plead to action at law in the State court—his mental condition at the time the process was served, and at the date of the judgment obtained against him?

OPINION OF THE REGISTER.

Upon the foregoing questions, the Register is of the following opinion: The lien creditor, John B. Harding, should have produced evidence satisfactory to the Register, or answered the questions of the assignees, in relation to his asserted lien against the estate of the bankrupt. The validity of the judgment being put in question, and no certified copy of the proceedings in the State court being exhibited before the Register, it is impossible for him to express any definite opinion on the questions presented. But if it should be shown that the pro-

ceedings in the State court were in all respects regular and legal, and that the defendant *had a day in court* and pleaded, and upon the issue joined the judgment was rendered, then the plea of *res judicata* prevails, and I am of opinion that said judgment, according to the laws in force at the time in Virginia, constituted a lien upon the real estate of the bankrupt; if, however, the record of the proceedings in the State court discloses the fact that the defendant made no appearance, that no matter was pleaded, and no issue joined, in the action upon which the judgment was obtained, it appears to the Register that the whole matter should be inquired into, but that the remedy of the assignees properly belongs to another forum. The question of the jurisdiction of the District Court to go behind the judgment of the State court, and inquire into the consideration of the debt upon which the judgment is founded, I think has been settled adversely *in re* Hugh Campbell, 1 N. B. R. Sup., 165, and reaffirmed *in re* Burns, 1 N. B. R. Sup., 174. *Vide* G. B. C. R., 69, 70. The plea of *res judicata* is conclusive, except for the *fact* of the insanity of the bankrupt alleged, or some informality or illegality in the proceeding in the State court. But if insanity, or any matter of fact, be the ground for a review of the judgment, a court of equity is not, but a court of *law* is, the proper forum for redress, and a writ of error, *coram nobis*, in the court wherein judgment was rendered, would be the proper mode of redress. The alleged insanity is matter of *fact*, which, if true, made the judgment erroneous, and which, if known to the court, would have caused it to provide for a proper defense, by guardian *ad litem*, Gardin Frayser, 2 Wash., 130; *Cole* v. *Pinnell*, 2 Rand, 174; and when the *fact* is of the kind which may be made the ground of a writ of error, *coram nobis*, equity has no jurisdiction; *Williamson* v. *Appleberry*, 1 How., 206, in which a party was *dead* when judgment was rendered. The chancellor held it no ground for injunction, but for error, *coram nobis*. The relief granted in equity by virtue of Code of Virginia (141, ed. 1860), applies to cases wherein money *has been paid out* upon usurious considerations; and is not

applicable to judgments upon which no money has been paid out.

I am, therefore, of opinion that the District Court cannot go behind the judgment; but that the assignees, if they desire to raise the question, must sue out a writ of error, *coram nobis*, in the court which rendered the judgment, and have it reversed. The suit will then be open, and the jurisdiction of this court will attach to the whole subject as if it were a pending suit when the proceedings commenced in this matter.

JOHN F. COBBS, *Register*.

In re Walter C. Calloway.

At Lynchburg, in said district, on the 15th of June, 1869, before me, John F. Cobbs, one of the Registers of said court in bankruptcy, upon an order in said matter heretofore made and entered, for an examination of John B. Harding *et al.*

Present: *L. D. Haymond, Esq.*, attorney for assignees; *Andrew Rutherglen, Esq.*, attorney for John B. Harding, etc.:

The said John B. Harding personally appeared before me, at the time and place designated in said order, but refuses, through the advice of his attorney, to be examined in relation to a judgment obtained against the bankrupt prior to the commencement of these proceedings in bankruptcy.

First. Because a question of law as well as facts has been raised in these proceedings, and are requested first to be certified to the court for its decision.

Second. Because, until the decision of the court has been obtained, it is incompetent to proceed with the evidence sought to be had.

The following are the questions of law and facts arising in said matter, and asked to be certified to the court for its decision, viz.:

Is it competent for the District Court to go behind the judgment of the State court, and inquire into the consideration of the debt upon which the judgment is founded?

Is it admitted that a judgment was rendered upon a

plea of usury, and the amount and date of said judgment duly rendered after hearing both parties in the State court.

REGISTER'S OPINION.

Upon the foregoing question the Register is of the following opinion:

By the petition of the assignees, the only question they ask to be inquired into by the court being that of *usury*, in the consideration of the debt upon which the judgment is founded, having already been adjudicated in a court of competent jurisdiction, the plea of *res judicata* in the present matter must prevail.

The Register is of the further opinion that the witness and creditor, John B. Harding, is right, and should be sustained by the court, in refusing to be examined in relation to the question of usury upon the debt for which the judgment was rendered; the matter having been fully heard and determined in open court, and that said judgment, by the laws of Virginia in force at the time of its rendition, constituted a lien upon the real estate of the said bankrupts.

JOHN F. COBBS,
Register.

In re Ira Hurt & Walter C. Calloway.

George C. Brown, assignee of Ira Hurt, and the same Geo. C. Brown and John W. McKinsey, assignees of Walter C. Calloway, by their attorney moved to strike out or expunge the proofs filed in each of said cases by Andrew Rutherglen, attorney for John B. Harding, on June, 1869, on the following grounds, to wit:

First. That the said proofs appear to be intended for cases in which the proceedings are involuntary, whereas both of these cases are voluntary proceedings.

Second. The debts set up and claimed in said proofs were founded on an usurious consideration, and are, therefore, illegal, and these estates cannot be charged with their payment.

Third. The debts are claimed as liens on the entire estate of the bankrupts, whereas, if they are liens at all, they only bind the real estate.

Fourth. For informality in not conforming to the requirements of General Clause 103, Section 22 of the Bankrupt Act. They do not, nor do either of them show any reason why the creditor himself could not have made the deposition in person. The attorney does not "testify to the best of his knowledge, information, and belief," nor does he set forth his means of knowledge as to said claims.

Fifth. In the matter of Hurt, if the writ of summons of the State court was served on said Hurt at all, it was at a time when he was of unsound mind, and incapable for that reason of giving it any attention; and the *supposed* judgment was rendered at a special term of Roanoke Circuit Court, held more than thirty miles from the place of Hurt's residence, when he was still of *unsound mind*, but also when there was no public means of communication between Roanoke Court-House and Hurt's neighborhood, it having been not long after the close of the late war; and hence Hurt, nor his agent, or committee (if he had one), had no notice of said special term, and could not for that reason have made any defense in said court. But if the proofs in these cases, or either of them, shall be sustained and admitted, then it is claimed that the creditor has thereby surrendered any and all liens supposed to exist or to have been created by the judgment described and set forth in said proofs.

In re Ira Hurt, Sen., and Walter C. Calloway.

John B. Harding, by his attorney, objects to the proposed proceedings in the cases in bankruptcy of Ira Hurt and Walter C. Calloway, in respect that they are beyond the jurisdiction of the court in bankruptcy.

First. Because the proposed proceedings are instigated by the assignees of these bankrupts in defiance of an established rule in law in bankruptcy, that "the rights of a bankrupt to

sue for and recover back money paid by him as usury is not such a right of property as vests in assignees in bankruptcy." *Nicholas* v. *Bellows*, 22 Vt. (Wash. 7), 581.

Second. Because the said Harding's proofs of debt, filed with the Register in these cases, consists of judgments obtained in a competent court, and are conclusive with respect thereto. *Williams* v. *Armroyd*, 7, Cranch 423, 603.

Third. Because a judgment or decree of a court of competent jurisdiction is conclusive that where a matter has been once heard and determined in one court, it cannot be raised anew and reheard in another, and hence the plea of *res judicata* in the present case prevails. *Hopkins* v. *Lee*, 6 Wall., 109 *Bank of the United States* v. *Beverly*, 1 How., 134.

Fourth. Because a judgment of a *State* court cannot be assailed in the District Court, but the assignee and creditors must resort to the State court to test its validity. *Ex parte* Burns, 1 N. B. R. Sup., 174; *Atkinson* v. *Purdy*, Crabbe, 551.

Fifth. Because, had there been grounds for making such an investigation as the one sought, it is out of time, and falls under the rule *competent*, but *admitted*, and therefore it has been held that "where the offense for which the penalty is demanded was alleged and proved to have been committed on the 14th day of October, 1807, and the bill was found by the grand jury November, 1808, that whatever interest the complainant might have had was lost at the commencement of the prosecution, more than one year, the time limited, having elapsed." Angel on Limitations, Section 109, p. 96.

Sixth. Because, in respect that the preceding points have arisen in the proceedings, the said Harding desires the opinion of the District Judge thereon, and until such opinion be obtained and duly intimated to all concerned, he denies the competency of the Register to proceed further under the order made on the requisition of the assignees.

JOHN B. HARDING,
By his counsel,
Andrew Rutherglen.

Lynchburg, 15th June, 1869.

In re Ira Hurt, Sen., and Walter C. Calloway.

At Lynchburg, in said district, on the 15th of June, 1869, before me, John F. Cobbs, one of the Registers of said court in bankruptcy, the foregoing objections being presented to the claims of John B. Harding, a creditor who has filed his proofs of debt, the same is requested to be certified to the court for its decision thereon, which is herewith done accordingly. And upon the foregoing objections I am of the following

OPINION.

The proofs have been admitted to file and appear in form, and since they distinctly assert and claim a lien, although against the *entire* estates of the several bankrupts, the *real lien* is not thereby vitiated.

The *informality* in the proofs objected to does not avail for the reason the witness has sworn positively of his own knowledge.

The remaining objections to said proofs, I think will be found passed upon in the opinion of the Register expressed upon the questions certified to the court for its decision in each of the said matters in bankruptcy.

JOHN F. COBBS, *Register.*

September 24th, 1869. The decisions of the Register are approved and affirmed.

JOHN C. UNDERWOOD, *Dist. Judge.*

L. D. Haymond, Liberty, counsel for assignees.
Andrew Rutherglen, Richmond, counsel for Dr. Harding.

UNITED STATES CIRCUIT COURT—E. D. MICHIGAN.

A creditor can file a petition against his debtor even though his claim is not due.

If the debts are provable under the act they are such as the act contemplates as sufficient on which to base a bankruptcy petition.

The act surely does not contemplate such inequality as there would be in precluding a creditor holding notes to amount of ten thousand dollars from the right to petition, when one holding an open account to amount of two hundred and fifty dollars is allowed to have the debtor declared a bankrupt if he has been guilty of the acts prescribed as acts of bankruptcy.

In re ALEX. R. LINN *et al. v.* LORING M. SMITH.

EMMONS, J.—The act of bankruptcy having been traversed, the matter was tried before a jury in the District Court, before his Honor Judge Withey. Two objections are argued in this court: 1st, That the petition alleged a debt which was *due and payable*, and there was a variance between it and the evidence. 2d, That as the debt was *not due* when the petition was filed it cannot be sustained.

The 39th Section of the act provides that creditors whose debts are *provable* under the act may petition, and Section 19 authorizes debts *not due* to be proved. The 32d Section discharges the bankrupt from all debts which are provable. Literally construed, these provisions are wholly unambiguous, and authorize a creditor whose debt is not due to become a petitioner. The consequences, too, of a different construction would seem clearly to justify this rendering of the law. Unless such a creditor can petition he cannot, before the maturity of his debt, become a party in any other form, and the injustice will result of discharging a citizen's debt by proceedings which he can neither originate nor aid in controlling. The petition must be filed within six months from the commission of the act of bankruptcy, and a fraudulent preference made more than four months before the petition cannot be defeated. If, therefore, an immature demand will not authorize a proceeding, every creditor whose debts do not fall due within this period may be wholly deprived of all the protection intended to be secured. In numerous instances the fraudulent debtor would be without restraint. Other equally impolitic results might be stated, rendering it, in the last degree, improbable that the lawmakers intended to deny a creditor who held a debtor's note for ten thousand dollars, due in one year, the liberty of petitioning, while he who had an open account of two hundred and

fifty dollars, because no credit was agreed upon, was allowed to do so.

It is claimed this reading is erroneous, and an argument of much learning and plausibility was made. The common conviction of the bar that the debt must be *due* was appealed to, the analogies in proceedings at law for the collection of debts, and the construction put upon the old English bankrupt laws were much relied on. Mr. James and Mr. Hilliard, in their commentaries on the statute both fully sustain the position of the appellant. Hilliard's Bankrupt Law, p. 184, says: "A future debt is held no ground for a petition. No action can be commenced upon it, much less can there be a commission of bankruptcy taken out upon it, whereby, as it were, all the property of the bankrupt is seized in execution." James' Bankrupt Law, p. 265, says, the clause authorizing debts provable to be the subject of petition is satisfied by making it refer solely to the nature of the debt. That is, it must not be for a *tort*, or of such a nature as not to be provable.

These books, issued soon after the publication of the law, are, in all probability, the source of the professional conviction which has been appealed to by counsel.

The reason given for the reading of Mr. James is quite insufficient. It never would have occurred to any lawmaker that courts, by a far-fetched judicial construction, would authorize a petition by parties whose debts were neither provable for a dividend nor discharged by the decree. Such a party has no possible connection with the proceedings, and the clause could not have been inserted for the purpose of excluding him. No other reason has been suggested why this section should not be held to mean what it says, that any creditor who may prove his demand, share in the dividends, and is barred by the decree, may launch the proceedings.

Mr. Hilliard seems mainly influenced by the idea that no action can be maintained upon an immature demand, and says much less can a commission issue upon it. This is exceptionally fallacious. It is not an instance where the causes which prohibit action in one case have an increased application in

another. So far as these respective qualities are involved in these proceedings there is no analogy between these wholly different processes. The one is to collect an overdue debt, to prosecute which before it is due would be as absurd substantially, and in common reason, as it is technically illegal. The other is to arrest a fraud upon a statutory trust; to commence an action in favor of all who are wronged, after its cause is complete, and the consequences of which are common to the mature and the immature demands. Both classes being alike protected by the statute and cut off by the decree, every reason which sustains action as to one must necessarily authorize it in favor of the other. This interpretation is not in the most remote degree at war with the familiar rule relied on by Mr. Hilliard, that you cannot sue the citizen upon a promise which he has not broken, or for a duty which he has not omitted. See 1 Doug., Mich., 330, *Galloway* v. *Holmes;* 3 Mich., 531, *Hall* v. *Chandler;* 17 Mich., *Cross* v. *McMaken;* Drake on Attachment, 25 to 34; 1 Chitty Pleadings, 299; 20 M. E., 287; and the kindred judgments and authors sustaining this familiar rule have no tendency to prove anything beyond it. There is another equally familiar and consistent one, that where property, either by operation of law or by act *in pais* is in any mode constituted a trust for the security of acts or the payment of debts, and the custodian of the fund attempts an illegal appropriation, the law in all cases affords an immediate remedy. In these cases the question whether the debt is payable *in præsenti* or at a future day, however remote, is wholly immaterial. A creditor whose bond is not due may sustain a bill against an administrator dealing wrongfully with the assets. (2 Story Eq., Section 547.) If a trust company should threaten to divert its funds to the destruction of annuities or its long obligations, equity would interfere. See 2 Story Eq., Section 825, for a list of the "*brevia anticipitantia*" at law, and Sections 826 to 851 for numerous instances where future interests and demands not due are protected.

The statute makes all the property of a debtor, in case of his insolvency, a trust fund for equal distribution among his creditors

ors. Their agreements for credit have been made in reliance upon the debtor's implied promise that he will so hold it, and the analogies in other departments of the law, so far from being in conflict with, all demand that construction given by the Detroit judge. It is an instance of one holding property which the law devotes to one purpose seeking to divert it to another. The common law, I concede, has irrationally withheld the extension of this principle to all the occasions where its reasons would carry it, and has denied a remedy before judgment to a creditor at large against the funds of his debtor when no trust existed. So impolitic has this narrow doctrine been deemed, that in the absence of a Bankrupt Law many States have authorized *attachments* of a fraudulent debtor's property upon demands before their maturity. (See Drake on Attachment, cited *ante*.) This provision now to be construed affords a remedy of the same general nature. We shall disregard no principle of policy or general jurisprudence by giving the words of the statute their natural and literal meaning.

The decisions and books referred to in reference to the early English Bankrupt Law demand a wholly different reading of our own statute from that which Mr. Hilliard and Mr. James suppose they justify.

I have examined 14 East., 197; 5 Launt., 338; 9 East., 498; 1 Mod., 50; 4 East, 438, and 1 Lord Raymond, 724, cited by counsel, and many other like cases, and, so far as they are accessible, the successive English acts under which they were made. A detailed analysis would lead to unwarranted prolixity. It is sufficient to say generally the statutes were so unlike our own as to render these judgments wholly inapplicable to its construction. But the history of English legislation and judicial discussion is by no means unworthy of notice. It shows quite clearly why the provision we are discussing assumed its present form. The earlier acts which will be found cited and construed in the cases referred to, did not authorize a debt not due to be proved at all. It was discharged by the decree, and the creditor was in no wise a party to, or affected by, the proceedings. Of course, under such a law he could not petition. It needed

no judicial criticism to determine that. The law was amended so that such claimants might prove their debts, but the statute expressly prohibited their becoming petitioning creditors. It assumed quite clearly they would be such without the proviso, after they had been authorized to make proof, and their claims subjected to a discharge. In a few years afterwards there was still another amendatory act reciting that this inhibitory proviso had been found inconvenient and it was therefore repealed. Demands which were immature were placed on the same footing with those overdue, and all alike were authorized to initiate proceedings. Since the 5 Geo. II., c. 30, by successive provisions this policy has been adhered to, of authorizing all creditors whose debts were provable and so discharged under the act, to be petitioners. The 24 and 25 Vic., c. 134 (James' Bankrupt Law, 265), contains full provisions to this effect. That the person who drafted our law had gone over this history and used the word "provable" in reference to the principle it establishes, there can be no doubt. At no period in England has the anomaly here insisted on been administered. If a creditor there could not petition, it was because he could not prove, and because his debt was not discharged by the decree. Whenever he was subjected to the power of the law he was authorized to launch and aid in working the proceedings under it. It is quite unreasonable to suppose that our statute, passed in the light of such legislation and judicial discussions, using as it does the most appropriate language to embody its principle, intended to discard it. Our law of 1841, although far less explicit than the present one, was held by Judge Conklin to authorize a petition by a creditor whose demand was not due. Such I understand was its accepted construction. (See 5 Law Reg., 214, *ex parte* Tower; 8. I also agree with the District Court that if it was not necessary to aver the demand was due, there was not a fatal variance.

The judgment below is affirmed.

A. Russell, for appellant.

Don M. Dickinson, for appellee.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where debtors gave a chattel mortgage as security, within three months of filing petition in bankruptcy—the mortgage was foreclosed, the property bid in by the mortgagees, and the proceeds applied to the debts. The assignee filed bill to recover the value of the property so mortgaged, alleging it to have been given with a view to preference, and a decree was rendered in favor of assignee, which the creditors paid in full.

Creditors contend that the payment by them of the decree is a surrender, etc., and that they are entitled to prove their debts against bankrupt's estate. This is contested on the part of assignee and certain other creditors.

Held, that the claimants accepted a preference on account of the debt or claim, having reasonable cause to believe the same to be contrary to the provisions of the Bankrupt Act.

2. That the payment by said claimants of the decree obtained against them is not a surrender within the meaning of the Bankrupt Act.

3. Therefore, they are not allowed to prove their said debt or claim against the estate of said bankrupts.

In re TONKIN & TREWARTHA.

ON an issue made before the Register, Hovey K. Clarke, Esq., in the matter of the proof of claim of Franklin Moore, George Foote, and George F. Bagley, constituting the firm of Moore, Foote & Co., against the said bankrupt's estate, and adjourned into court for trial,

Moore & Foote also presented a claim against the said bankrupt's estate for proof. The assignee objected to the same, on the ground that the said creditors had accepted a preference, having reasonable cause to believe that the same was given by the said debtors contrary to the provisions of the Bankrupt Act, and have not surrendered to the assignee all property, money, etc., received by them under such preference, as required by Section 23 of the said act.

The facts are as follows:

On the 9th of May, 1868, the bankrupts being indebted to the above-named claimants, in the sum of about eleven thousand dollars, gave their creditors a chattel mortgage on substantially all their property, as security for the debt. This mortgage was afterwards foreclosed, and the property bid in by the mortgagees, and the proceeds applied on the debt

Subsequently, on the 3d of August, 1868, the debtors filed their petition in this court, to be adjudicated bankrupts, and were adjudicated bankrupts accordingly. The assignee of said bankrupts filed his bill in the Circuit Court for the Eastern District of Michigan, in equity, to recover the value of the property so received by the said creditors, under their said chattel mortgage, to which bill the said creditors appeared and made defense. Such proceedings were had in the said suit, that on the 5th of March, 1870, a decree was rendered therein, in favor of the assignee, and against the said creditors, for the full value of all the property so received by the said creditors, under their said chattel mortgage, which decree has been paid in full by the said creditors to the assignee.

Copies of the decree and of the able opinion of Judge Withey, of the Western District of Michigan, before whom the case was tried, are submitted as evidence upon this issue by stipulation, as containing a true statement of the facts in the case. From these proofs it appears:

First. That the debtors were insolvent at the time the mortgage was given.

Second. That the mortgage was given within four months before the filing of the petition for adjudication of bankruptcy by the bankrupts, and that it was so given with a view to give a preference to the said creditors.

Third. That the said creditors had reasonable cause to believe that the bankrupts were so insolvent at the time they received said mortgage, and that the said mortgage was made in fraud of the provisions of the Bankrupt Act.

Fourth. That the said decree in favor of the assignee, was based exclusively upon the facts above stated.

It is now contended on behalf of the said creditors that the payment by them of the said decree, is a surrender to the assignee of all property, money, benefit, or advantage, received by them under the said preference, within the meaning of Section 23 of the Bankrupt Act; and that they are, therefore, entitled under said section to prove their debts against the said bankrupts.

On behalf of the assignee and of certain creditors, who have proved their claims against the bankrupts' estate, this position, and the said claim of the said Moore and others, are contested.

Mr. Lathrop and *Mr. Meddaugh*, for claimants.

Mr. Pond, for assignee.

LONGYEAR, J.—The decision upon the issue presented, depends entirely upon the construction to be given to the last clause of Section 23 of the Bankrupt Act, which provides that, "any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of the act, shall not prove the debt or claim on account of which the preference was made or given; nor shall he receive any dividend therefrom, *until he shall first have surrendered to the assignee* all property, money, benefit, or advantage received by him under such preference."

Have these creditors surrendered to the assignee all property, money, etc., within the meaning of this provision? In other words, is payment of a judgment or decree recovered against a creditor on account of a fraudulent preference, a "surrender" within the meaning of the act? In order to answer this question intelligently, it is necessary to consider the provisions of the act under which the decree paid by these creditors was obtained, in connection with the above provisions of Section 23. This provision under which the decree was obtained, is found in the first clause of Section 35, and is as follows:

"That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition, by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assign-

ment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act—the same shall be void, and the *assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.*"

To "surrender," under Section 23, clearly implies action on the part of the person receiving the preference. To "recover," under Section 35, as clearly implies action against the person receiving the preference. Under Section 23, it is left to the option of the person receiving the preference whether he will give up the property, etc., he has received by the way of preference, or whether he will hold on to it. The only consequence being that he cannot prove his debt, or receive any dividend upon it, in case he chooses to pursue the latter course. In case of a recovery under Section 35, he has no such option. If it were not for Section 35, and there was no other provision than that contained in Section 23, then in case the creditor receiving a preference did not surrender, the assignee and the other creditors would have no alternative. They would be utterly remediless, and the creditor, if he saw fit, could hold on to the property, etc., so received by him, if he so elected, regardless of any disparity there might be between his debt and the property, etc., so received by him, and thus the primary object of the Bankrupt Act, viz., to compel an equal distribution of the debtor's property, would be liable to be entirely defeated. Section 35 provides the alternative.

From this analysis of Sections 23 and 35, it therefore clearly appears that the recovery provided for in Section 35 is the alternative of the surrender provided for in Section 23. But when does this alternative arise, and in what case may it be resorted to? Clearly in those cases, and those only, in which there is a failure, refusal, or neglect to surrender. A surrender may probably be made so as to fully answer the requirements of Section 23, at any time before judgment, because the word "recover," in Section 35, is evidently used in its strict

legal sense, and in that sense the obtaining of judgment by the assignee in his favor, is the recovery meant. As no question arises in this case, however, as to the right of a person receiving a preference to surrender after suit commenced against him by the assignee and before judgment, I refrain from expressing any positive opinion upon it. But how is it after the recovery is complete by the rendition of judgment, or decree, as in this case? What has the party receiving the preference then to surrender? If the recovery is of the property in kind, he certainly has not that to surrender, because it has already been transferred to the assignee, by the judgment or decree of the court. If the recovery is for the value of the property, in money, then the collection of the judgment or decree by the assignee is but receiving the fruits of the recovery, and it makes no difference in this respect whether the collection is enforced by levy and sale on execution, or by receiving the money upon it, without compulsory process. The recovery is complete when judgment or decree is entered, and anything done after that in satisfaction of the judgment or decree, is done by force of the recovery, and can in no sense be decreed a surrender, within the meaning of Section 23.

Judge Miller, of Wisconsin, *in re* Princeton, 1 N. B. R., 618, holds substantially the same doctrine, and says: "Under Sections 23 and 35, when a creditor accepts a preference with reasonable cause to believe that his debtor is committing a fraud upon the act, he is barred from proving his debt, or receiving dividends, unless he make return of the matter so received, and, on failure to do so, *he may lose both, and all benefits from the preference and dividends of assets.*"

But it was contended in the able arguments of counsel for claimants, that because there is an express prohibition against a creditor receiving a preference after a recovery, in cases arising in involuntary bankruptcy (see Section 39), and none in cases arising under Section 35, that, therefore, no prohibition was intended in the latter class of cases.

From the views above expressed in relation to Sections 23 and 35, the following conclusions are inevitable:

First. Section 23 prohibits the proof of claims in the cases therein specified, without a surrender.

Second. Such prohibition continues until such surrender is made.

Third. No surrender can be made after a recovery under Section 35.

Fourth. Therefore, there having been a recovery, the prohibition of Section 23 remains, and has become perpetual without a repetition of it in Section 35.

The express prohibition contained in Section 39, will now be considered.

Sections 35 and 39 are very nearly related to each other in their provisions, and must be construed together, in *pari materia.* Section 35, in express language, applies equally to voluntary and involuntary cases. Therefore, all the qualifications and conditions prescribed by Section 35, not inconsistent with the provisions of Section 39, will apply to proceedings under the latter section, and all the qualifications, conditions, and prohibitions of Section 39, so far as they relate to the same class of matters provided for by Section 35, and are not inconsistent with its provisions, will apply to proceedings under Section 35 (see *in re* Montgomery, 3 N. B. R., 374; *in re* Davidson, *Ib.*, 418, where similar doctrine is held by Judge Blatchford, of the Southern District of New York). I have, however, been unable to find any adjudicated cases presenting the precise question now under consideration.

But it is claimed that Sections 35 and 39 are inconsistent in this. That by the first clause of Section 35 above quoted in full, no preference can be attacked unless it was given within four months before filing the petition for adjudication of bankruptcy, whereas by Section 39 such preference may be attacked if made within six months before the filing the petition, and that, therefore, that clause of Section 35 (being the clause particularly applicable to this case) cannot be construed together with Section 39.

On a close inspection of the clause of Section 39 referred to, it will be seen that the six months' limitation therein provided,

applies solely to the time within which the petition for adjudication of bankruptcy must be filed, and not to the time within which a preference may be attacked. The objection, therefore, has no foundation.

The class of cases provided for in the said first clause of Section 35, is also provided for in Section 39, and therefore, under the rule before stated, the express prohibition contained in the last clause of Section 39, applies equally to Section 35 as to Section 39.

This prohibition is as follows: "And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred, contrary to this act. *Provided*, The person receiving such payment or conveyance had reasonable cause to believe that a fraud on the act were intended, and that the debtor was insolvent, and *such creditor shall not be allowed to prove his debt in bankruptcy.*"

I concede that this prohibition was unnecessary so far as concerns the class of cases to which the case at bar belongs, and it probably would not have been inserted if Sections 35 and 39 had covered no other class of cases. The class of cases to which this belongs is a very limited one, viz., that of preferences only. The prohibition of Section 23 does not cover any other class of cases than this, and does not extend to any preferences received before the approval of the act.

Sections 35 and 39 provide for recovery in other cases than those of preference merely, such as payments, sales, etc., with a view to prevent the debtor's property from coming to his assignee in bankruptcy, etc.; and money, goods, etc., obtained by a creditor as an inducement to forbear opposition to the bankrupt's discharge; and assignments, gifts, sales, etc., with intent to delay, defraud, or hinder creditors.

The express prohibition contained in the last clause of Section 39, above quoted, was inserted there in order to prescribe one general rule, applicable alike to all cases of recovery of money or other property paid, conveyed, etc., to creditors, contrary to the Bankrupt Act.

The claimants in this case are therefore prohibited from proving their claim under both Sections 23 and 39.

I hold, therefore:

First. That the claimants, Franklin Moore, George Foote, and George F. Bagley, after the approval of the Bankrupt Act, accepted a preference on account of the debt or claim presented by them, from the bankrupts William Tonkin and William Trewartha, having reasonable cause to believe that the same was made and given by the said bankrupts contrary to the provisions of the said Bankrupt Act.

Second. That the payment by the said Moore and others of the decree obtained against them by the assignee, is not a surrender to the assignee within the true intent and meaning of the Bankrupt Act.

Third. That, therefore, they are not allowed to prove their said debt or claim against the estate of the said bankrupts.

UNITED STATES CIRCUIT COURT—MASSACHUSETTS.

An indictment, where defendant is charged with disposing of certain of his goods and chattels, within three months of his bankruptcy, other than in the ordinary course of his trade, which he had obtained on credit and which remained unpaid for. Defendant was sentenced to fifteen months, imprisonment.

UNITED STATES *v.* HUGH CLARK.

LOWELL, J.—The third count of this indictment charges that the defendant, within three months next before the commencement of proceedings in bankruptcy, did dispose of, otherwise than by *bona fide* transactions in the ordinary way of his trade, certain of his goods and chattels described, which he had obtained on credit and which remained unpaid for, with intent to defraud a certain creditor. It is objected that Congress cannot legislate for frauds committed by a debtor on a single creditor within the same State, unless the act relates to bankruptcy or to some other matter within the Federal jurisdiction; and that it has not in fact so legislated in this case. Without

passing upon the constitutional question, which is yet under advisement in this court in a case argued before the presiding justice, upon an indictment framed upon the preceding clause of Section 44 of the Bankrupt Act, I may say that on the construction of the clause now under consideration, I am of opinion, with the defendant, that the scope of the act is to punish frauds on the creditors generally, and not on the particular creditor who sold the goods, nor any other single creditor, and that this count, which charges a fraud upon one creditor only, cannot be sustained. If the goods were obtained on credit with the intent of disposing of them to raise money, the fraud on the seller would be the most obvious one; but the object of the statute seems to be to punish frauds on the creditors generally, and it does not refer the intent to the time of the disposing of the goods out of the usual course of trade, and at that time the fraud would not be of one creditor more than of the rest.

But the verdict cannot be set aside if either of the other counts are good, for it was a several finding on each of the three charges. The first and second counts both allege specific omissions of property and effects from the schedule of assets filed by the defendant with his voluntary petition in bankruptcy. It is urged that all the acts and omissions mentioned in the first part of Section 44, must take place after the proceedings are begun, whereas the filing of the schedules, in voluntary petition, is contemporaneous with the beginning of the proceedings. Upon a careful reading of the section, it appears by no means necessary to hold that the clause beginning "or shall with intent to defraud willfully and fraudulently conceal from his assignee or omit from his schedule" is qualified by the original limitation of time. It is a new division of the subject and one which requires no such limitation; because the prohibited act cannot be committed before bankruptcy. The offense is complete if a bankrupt fraudulently omits from his schedule any property or effects, with the designated intent. An English case was cited to show that a bankrupt ought not to be held guilty of omission and concealment until he had passed his last examination. But that case was decided under

6 Geo. III., Ch. 16, Section 112, which punishes a bankrupt who shall not, upon his examination, deliver up his estate, books, etc., and it was held that he had a *locus penitentiæ* until his last examination. Under our act, his duty is to file accurate schedules at the outset, and if they are fraudulently inaccurate, he is punishable. We have no last examination in bankruptcy, nor any examination at all unless specially ordered. The whole system is so different in this respect that the case cited has no relation to the subject of inquiry.

Another objection is, that the indictment does not sufficiently show that the Bankrupt Court had jurisdiction, and that the proceedings were regular and sufficient. Under this head, again, there was much reliance placed upon the English cases. It is hardly necessary to consider how far an indictment must go in this direction. We have never adopted the English practice of requiring, in an action tried by an assignee, evidence of every fact necessary to show that he is rightfully such. The assignment is conclusive evidence of his right. In this case, however, enough is pleaded to show that the District Court, sitting in bankruptcy, had jurisdiction of the subject-matter and the person, and that proceedings were duly begun. The absence of an allegation that the defendant took the oath of allegiance is more especially relied on. To this there are two answers. 1st. That the omission of effects from the schedule, with intent to defraud, might be complete before the oath of allegiance was taken, because, although the prescribed form contemplates that the oath shall be annexed to the petition, yet it cannot be doubted that by the very terms of the statute it might be lawfully filed at any time afterwards, and before further proceedings are had, and with precisely the same effect as if annexed. It may be doubted, however, whether the bankrupt can take advantage of the omission of his duty in this respect. But the more decisive answer is, that neither the law nor the prescribed form requires that the petition should state whether the bankrupt is a citizen of the United States or not, and this indictment does not show this defendant to be a citizen; and as the act is equally applicable

to resident aliens, while the oath is to be taken only by citizens, there is nothing on the face of this indictment which calls for an allegation that this oath was taken. If the defendant was a citizen, and neglected to take the oath, he must show it in defense. The indictment, in setting out the petition, follows the form of petition prescribed by the Supreme Court, and actually adopted in this case.

M. F. Dickinson, Jr., Assistant United States Attorney, for United States.

E. Avery, for defendant.

The defendant was thereupon sentenced to imprisonment in the jail of the Commonwealth at Dedham, in the county of Norfolk, for the space of fifteen months.

UNITED STATES DISTRICT COURT—TYLER, TEXAS.

Where a creditor claims a lien by virtue of a judgment against the bankrupt, recovered on 5th November, 1866, but which was not recorded in the clerk's office until 16th October, 1867; and another creditor holds a mortgage executed by bankrupt, and recorded 7th April, 1867, *Held*, the mortgage lien has priority over the judgment.

In re W. Y. Lacy.

In this case, the question certified to me for decision by the Register, G. W. Whitmore, Esq., grows out of a controversy between D. A. Calhoun and J. M. Swanson, creditors of said bankrupt, in regard to the priority of their respective liens upon certain lands of said bankrupt in Anderson county.

Calhoun claims a lien by virtue of a judgment recovered against the bankrupt in the District Court of Anderson county, on the 5th November, 1866, but which was not recorded in the County Clerk's office of said county, until the 16th October, 1867. The lien claimed by Swanson accrues under a mortgage on the land, executed to him by the bankrupt, and recorded in said county, on the 7th April, 1867. On the 12th December, 1868, Calhoun proved up his judgment debt *without security*, and filed the same with the Register, and subsequently,

to wit, on the 14th August, 1869, he made new proof of his debt *with security*.

Construing together the three acts of January, 1842, 14th February, 1860, and 9th of November, 1866, in regard to the liens of judgments on real estate, it seems to me there can be no doubt that the mortgage lien in this case had priority over that of the judgment. This construction, I think, is fully borne out by the late decision of the Supreme Court of Texas in the case of *Scogin* v. *Perry*.

The decision of the Register is, therefore, in all respects affirmed; and the clerk will certify this judgment in the usual manner.

J. H. Duval, *United States Judge.*

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A bankrupt arrested on an execution issued on a judgment in an action for deceit, is not entitled to be relieved from the arrest pending the proceedings in bankruptcy.

C. H. Whitehouse, *Petitioner for Habeas Corpus.*

Lowell, J.—During the pendency of his proceedings in bankruptcy (to quote the language of Section 26 of the statute), the bankrupt was arrested on an execution issued from the Superior Court. The record of that court, if admissible, shows that the judgment was based upon a verdict rendered in an action for deceit, and was rendered before the bankruptcy. The question submitted is whether the arrest is within the exception of Section 26, as being in an action founded upon a debt, or claim, from which the bankrupt's discharge, if obtained, will not release him. With the consent of the parties I have consulted with Mr. Justice Shepley upon this point, and we think that the petitioner is not entitled to be discharged from arrest. The civil action in which he is arrested is distinctly and solely founded on fraud, and so is within the equity of the exception of Section 33. It is argued with a good deal of

force that a judgment merges the original cause of action, and converts what was an unliquidated demand for damages into a debt, and that it is altogether immaterial what the nature of the original demand may have been.

We are of opinion, however, that the record of the action, in whichever way the execution issues may be looked at, shows a material and traversable allegation of fraud as its sole foundation; the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. I do not intend to express any opinion upon the question whether a judgment in an action of contract in which an allegation of fraud, if made, would be immaterial, might not be such a merger or waiver as is contended for. It might be very difficult to admit evidence to vary or contradict the record in favor of the creditor when the debtor would be concluded on his side. Nor do I even mean to say that a suit on this judgment might not remove the fraud beyond the view of the court. In the case of Devoe, 2 N. B. R., 27, I decided that an arrest on *mesne process* in an action for deceit was within the exception and not to be relieved against, and I have seen no reason to change this opinion. I now decide that an arrest on execution in a similar action, comes within the same rule.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a transfer of property had been made by bankrupt nine months prior to adjudication, and certain creditors preferred charges of fraud, etc.,

Held, the conveyance is not one which the Bankrupt Act denounces as fraud. There was no false swearing in not inserting such property in the schedules of assets, it being vested in the receiver appointed by the State court, and not in the bankrupt. The other specifications are not sustained. Discharge will be granted when the Register shall have certified conformity.

In re ROBERT H. FREEMAN.

BLATCHFORD, J.—As to the first specification, whatever in-

terest the bankrupt may have had in the property referred to, after the conveyance of it to E. Walcott & Co., March 21, 1868, was at the time the petition in bankruptcy was filed vested in the receiver appointed by the State court, and not in the bankrupt. There was, therefore, no false swearing in not inserting such property in the schedule of assets. The fact of the transfer to Walcott & Co. was set forth in the schedules with sufficient particularity, and there was certainly no willful false swearing in respect to the property.

Nor was there within the second specification any concealment of the property referred to.

The fourth specification is, that the bankrupt made a fraudulent conveyance of the said property to Walcott & Co., being the said conveyance of March 21, 1868. The petition in bankruptcy was filed December 31, 1868. The conveyance referred to in Section 29, as a "fraudulent" conveyance, means a conveyance which is declared by the Bankrupt Act to be a fraud against such act; a conveyance which the act declares to be void. This requires the conveyance to be one made, as required by Section 35, either within four months or within six months before the filing of the petition by or against the debtor. As the conveyance in question was not made within six months before the petition in bankruptcy in this case was filed by the debtor, it is not a "fraudulent" conveyance within the clause of Section 29, which speaks of "any fraudulent payments, gifts, transfer, conveyance, or assignment." The fourth specification is founded on this clause, and therefore fails.

It is not established, under the fifth specification, that the bankrupt did not keep proper books of account.

Nor is it established, under the sixth specification, that the bankrupt "in contemplation of bankruptcy," as the specification says, "or in contemplation of becoming bankrupt," as Section 29 says, made the conveyance in question for either of the purposes set forth in the clause of Section 29, under which the specification is drawn. The meaning of the expression "in contemplation of becoming bankrupt," as used in that clause,

was defined by this court *in re* Goldschmidt, 3 N. B. R., 165. Within that definition, it is not established, in this case, that debtor, when he made the conveyance in question, contemplated committing an act of bankruptcy, either by filing a voluntary petition, or by doing some one of the things which is declared by Section 39 to be the commission of an act of bankruptcy. The specification is not sustained.

The third specification is, that since the passage of the act, the bankrupt has destroyed books, documents, papers and writings, with intent to defraud his creditors. The seventh specification is, that he removed or caused to be removed books, stationery, and papers from this district, with intent to defraud his creditors. The eighth specification is, that he, or some person in his behalf, has procured the assent of certain creditors to his discharge, and influenced their action by a pecuniary consideration. These three specifications are too vague to be triable, and are overruled.

A discharge will be granted when the Register shall have certified conformity.

Vernam & Wilcox, and *J. S. Ridgway*, for the creditors.

Robert Jackson, for the bankrupt.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where bankrupts are charged with not keeping proper books of account, and the receipts and disbursements entered in cash-book were unintelligible,

***Held*, discharges cannot be granted to bankrupts.**

In re JOHN MURDOCK MACKAY AND JOHN NEILSON.

BLATCHFORD, J.—I have been carefully through more than once the thirteen hundred manuscript folios of testimony in this case, and the various schedules and books of account put in evidence, and am compelled to come to the conclusion that discharges cannot be granted to the bankrupts.

The principal specification of objection to their discharge, is,

that being merchants and traders within the meaning of the Bankrupt Act, they have not, subsequently to the passage of the said act, kept proper books of account. Various particulars under this head are stated in the specifications. It is impossible to examine the cash-book of the firm of J. M. Mackay & Co., of which the bankrupts were members, nor to read in connection with it the testimony of the bankrupt Mackay, and not come to the conclusion that such cash-book fails to show, in an intelligible or proper manner, the nature and character of such receipts and disbursements of cash made by the firm as are entered therein, and that it fails to contain many entries of receipts and disbursements of cash that were made by the firm. It is also apparent from the testimony of the bankrupt Mackay, that many receipts and disbursements of cash were made by the firm that were not entered in any book or account, and of which no record was made. These objections are embraced in the specifications, and, upon them, without examining any of the other grounds specified, I am satisfied that it is my duty to refuse discharge.

T. C. T. Buckley, for the creditor.

G. C. Barrett, for the bankrupts

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where discharge was refused bankrupt for failing to keep proper books of account.

In re JOHN MAXWELL MACKAY.

BLATCHFORD, J.—Having come to the conclusion, on the evidence, that the bankrupt was, in fact, as a merchant and trader, a member with John Murdock Mackay and John Neilson, of the copartnership firm of J. M. Mackay & Co., a discharge must be refused to him, for the reasons set forth for refusing discharges to those persons; the specifications in opposition to his discharge as a member of said firm, as a merchant and tra-

der, being to the same effect as in respect to them, in regard to the keeping of proper books of account.

T. C. F. Buckley, for the creditor.

G. C. Barrett, for the bankrupt.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where an order for examination of bankrupt was obtained by certain creditors through their counsel, the application for said order being neither in writing nor under oath—the bankrupt had previously applied for his discharge.

Held, the Register, in the exercise of his discretion (Section 26), thought proper to grant the order, without requiring a petition or affidavit duly verified, showing good cause for granting the same. Nothing appears to show that that discretion was improperly exercised, and the order must stand. The time to examine the bankrupt does not expire with the making of his application for discharge.

In re ANDREW J. SOLIS.

I, ISAAC DAYTON, one of the Registers of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. Lord, of counsel for Andrew J. Solis, the bankrupt above named, and Mr. Robert Sewell, of counsel for Manning and DeForest, creditors of the said bankrupt.

On the 26th day of March, 1870, an order was made in this bankruptcy, requiring the creditors of the said bankrupt to show cause, on the 21st day of April, 1870, why a discharge should not be granted to the bankrupt.

On the 7th day of April, 1870, on the application of Manning and DeForest, creditors of the bankrupt, by Mr. Robert Sewell, their counsel, the undersigned granted and issued the order for the examination of the bankrupt hereto annexed. The application for the order was not in writing nor under oath, nor was any cause for issuing the order stated, excepting that the applicants were creditors of the bankrupt.

In re Solis.

On the 15th day of April, 1870, the said creditors of the bankrupt, by Mr. Robert Sewell, their counsel, attended before the undersigned.

The said Andrew J. Solis, the bankrupt, did not attend, but his counsel, Mr. Lord, appeared before the undersigned and made the following objections:

That the order for the examination of the bankrupt was not obtained on petition or affidavit duly verified, showing good cause for granting the same.

That the bankrupt having applied for his discharge, the time to examine him has expired.

And the said parties requested that the questions arising upon the said objections should be certified to the Honorable the Judge of the District Court of the United States, for the Southern District of New York, for his opinion thereon.

OPINION OF THE REGISTER.

The statute declares that "the court may, on the application of the assignee in bankruptcy, or of any creditor, at all times, require the bankrupt, upon reasonable notice, to attend and submit to an examination." The undersigned cannot perceive any necessity for obstructing the right here given to a creditor by exacting from him, when making the application, a petition or affidavit duly verified, showing good cause for the granting of the order. The words, it is true, are "the court may require the bankrupt to attend," etc., which, it maybe considered, gives the court a discretion, and perhaps warrants a Register in calling for a formal petition or affidavit. This has been understood by the undersigned to be all the meaning of the case of *Adams*, 2 N. B. R., 95. But all that the statute demands to give the court jurisdiction to make the order, is that the applicant shall be the assignee or a creditor. Anything beyond this is outside of the statute, and encumbers the proceedings with requirements not in any way essential to its purpose.

The Supreme Court has prescribed several forms of petitions, requests, and applications, but omits any form for an "application" in this case. And the "Order for Bankrupt's Examina-

tion," prescribed by the Supreme Court (Form No. 45), recites an "Application," but does not say anything of a petition or an affidavit showing good cause for granting the order.

In the case of *George Brandt*, 2 N. B. R., 45, the court says: "If a creditor desires to examine the debtor, the proper way to do it is by petition to the court, otherwise the court could know nothing of the desire of the creditor." Nothing is said of showing good cause for granting the order.

In the case of *Lanier*, 2 N. B. R., 154, the following opinion of the Register, "It is my opinion that the application of the assignee for the examination of the bankrupt need not be verified by his affidavit. I do not think that the law intends that any reason shall be stated by the assignee in his application," is approved by the court. The right of a creditor to the Order of court is by the statute put upon the same footing as the right of the assignee; and the Register in that case sustains the opinion just quoted by the following argument, which seems to the undersigned to be very cogent, and forcible upon this question, and applicable alike to the case of an application by a creditor, and to the case of an application by the assignee in bankruptcy, for the examination of the bankrupt.

"That this is the meaning of the 26th Section is evident from the context. A bankrupt may be required to submit to an examination regarding his bankruptcy at any time, on the application of the assignee, or of a creditor; but in order to obtain an order for the examination of the wife of the bankrupt, 'good cause' must be shown before it can be granted, or she required to attend. The maxim '*expressio unius est exclusio alterius*,' applies with great force here, as the proper rule of construction. The intent of the Legislature is clearly expressed in making 'good cause shown' a condition precedent to the examination of the wife of the bankrupt, while the bankrupt himself may be examined at any time, on the application of the assignee, or, without any application, by the court '*mero motu*.' (Section 26, Bankrupt Act.) No fact then appearing in the application of the assignee, and no reason being given except what the law clearly sanctions and implies in the demand itself,

no verification is necessary to be made by the assignee, in thus invoking the assistance of the court to enable him to perform his duties under the law."

The point was decided the same way in respect to an application by an assignee for the examination of the bankrupt in the case of *McBrien*, in this court, 2 N. B. R., 197. As has been seen, the statute does not make any distinction between an assignee and a creditor in this provision, giving the right to examine the bankrupt; and all the reasoning of the Register in his opinion in this case, applies with equal force to the case of an application by a creditor as to the case of an application by an assignee for the examination of the bankrupt.

Where the creditor has proved his debt against the bankrupt, and, either in person or by his attorney, makes a verbal application to the Register in charge of the case, who knows of the fact of the proof of his debt by the creditor, for an order for the examination of the bankrupt, and the order is granted and issued, the absence of a formal petition in writing for the order, ought not to defeat the creditor in his attempt to examine the bankrupt, and exempt the bankrupt from the duty of submitting to an examination. The manner of the application, whether verbally or in writing, so far as the bankrupt is concerned, is immaterial, so long as an application was actually made, which was the case in the present proceeding, as the fact of the application is recited in the order. To say that an application in writing would give validity to the proceeding, when the same words expressed verbally to the court or Register would be insufficient, would be to give effect to a ceremony at the expense of the substance.

The Register is of the opinion that the creditor is entitled to an order for the examination of the bankrupt, notwithstanding the bankrupt has applied for his discharge.

The Register will probably require greater diligence on the part of the creditor in the prosecution of his examination, where, in case no objections are filed, the bankrupt will soon be entitled to his discharge, than in a case where the application for the examination of the bankrupt has been made at an early

period of the proceedings in bankruptcy. But the creditor is not to be absolutely precluded from examining the bankrupt because he has not made his application for the examination until after the bankrupt has applied for his discharge.

ISAAC DAYTON,
Register.

BLATCHFORD, J.—My decision *in re* Adams, 2 N. B. R., 95, was, that the creditor in that case, in order to obtain an order according to Form 45, for the examination of the bankrupt under Section 26 of the act, must apply to the Register for such order by petition or affidavit, duly verified, and show good cause for the granting of the order. The Register had so held, in that case, on a verbal application to him without a petition or affidavit, and had refused to grant the order. The effect of the decision was merely that the Register had a discretion, under Section 26, to require good cause for granting the order by a petition or affidavit duly verified, and, as he had exercised such discretion, I saw no reason in the papers for interfering with his decision. *In re* McBrien, 2 N. B. R., 197, the Register granted an order for the examination of the bankrupt on the written application of the assignee, not supported by an oath. The bankrupt moved, before the Register, to vacate the order, because it was not founded on an affidavit showing good cause for granting it. The Register denied the motion, and I confirmed his decision, and concurred in his view that it was discretionary whether to grant an order, and what cause should be shown for it. In the present case the Register, in the exercise of his discretion, thought proper to grant the order without requiring a petition or affidavit duly verified, showing good cause for granting the same. Nothing appears to show that that discretion was improperly exercised, and the order must stand. The time to examine the bankrupt does not expire with the making of his application for his discharge.

UNITED STATES DISTRICT COURT—RHODE ISLAND.

Where bankrupt was charged, on petition of creditors, with having, in December, 1867, executed a mortgage with intent to prefer other creditors, and, in April, 1868, with having suspended and not resumed payment within fourteen days, the court granted an injunction on said mortgage, and, in July, the debtor was adjudicated bankrupt. The bankrupt leased a spacious mansion, and converted it into an infirmary and bathing establishment, and was supplied with wares and merchandise for fitting up the same by the mortgagees, upon an agreement of credit.

Held, there is not sufficient ground in the evidence for adjudging that debtor was insolvent or contemplated insolvency, or that, in making the mortgage, he even thought of the Bankruptcy Act, much less intended to violate any of its provisions. The mortgagees wisely asked for security, and the debtor had a right to give it. They are not shown to have violated any law, nor, so far as appears in the proofs, any private pledge or stipulation, or any wholesome custom of trade. Judgment in their favor, with costs of suit.

POTTER, DENISON & Co. *v.* JAMES H. COGGESHALL, *Trustee.*

KNOWLES, J.—The issue presented by the record (made up by my predecessor on the 7th of October, 1868) relates solely to the validity of a certain mortgage, as between the petitioners, Potter, Denison & Co., mortgagees, and James H. Coggeshall, trustee of Joseph Dow, with the powers and rights of an assignee under the Bankrupt Act: and I understand that neither party now questions the legality or expediency of disposing of the cause upon its merits, regardless of all judicial *dicta* or decisions touching the forms of procedure in such cases. Whether a claimant of property in the hands of an assignee can prosecute his claim by petition simply, or is bound by the terms of the law to institute a suit in equity by formal bill of complaint, is a question upon which I am not to be understood here to intimate an opinion.

The controversy arises upon the following facts briefly stated:

On the petition of Thomas Phillips & Co., a citation in bankruptcy was issued on the 23d of June, 1868, against Joseph Dow, returnable on the 1st of July, 1868. The acts of bankruptcy charged were these:

First. That on the 24th of December, 1867, he, being insolvent, made and executed a mortgage of certain personal effects to

Potter, Denison & Co., with the intent to give a preference thereby to them, they being creditors of his.

Second. That, being insolvent, he, on the 24th of December, 1867, made said mortgage of said property, with the intent, by such disposition of his property, to defeat or delay the operation of the Bankrupt Act.

Third. That on the 6th of April, 1868, being a trader, he suspended and did not resume payment of his commercial paper within a period of fourteen days.

Fourth. That, on the 24th of December, 1867, he made a conveyance or transfer of certain property, by way of mortgage, to Potter, Denison & Co., with an intent to delay, hinder, or defraud his creditors.

On the 29th of June, on the representation of Phillips & Co. that Potter, Denison & Co. were about to take possession of said property under their said mortgage, the court granted an injunction against any disturbance of the possession of Dow, who, on the 8th of July, was adjudged a bankrupt by default, upon the aforesaid petition of Phillips, and the matter referred to a Register. On the 27th of July, claims to the amount of seven thousand and forty-one dollars and ninety-five cents, were filed and proved by ten creditors, by whom, unanimously, James H. Coggeshall was appointed trustee, with the powers of an assignee (under Section 4 of the Bankrupt Act), to whom conveyances as prescribed by law were made on the 5th of August, 1868, by said Dow.

The property having thus constructively passed into the hands of the assignee, Potter, Denison & Co., on the 9th of September, 1868, filed a petition setting forth their claims and grievances, averring that the property was deteriorating (the trustee permitting it to be retained and used by the bankrupt), and praying for relief; upon a hearing of which, the court ordered that the property in question be appraised by disinterested appraisers, under oath, and the trustee give bond to Potter, Denison & Co., to pay to them the value of it, as reported by the appraisers, "*if and whenever* it shall be legally ascertained that the said mortgage is a valid mortgage, and

that the title of said Potter, Denison & Co. to said property under the same, is valid." This order was made on the 7th of October, and the first Wednesday of November, 1868, assigned for the inquiry directed. The appraisers, on the 30th of November made report, appraising the property as of the value of one thousand six hundred and fifty-eight dollars and sixty-two cents—its cost in the autumn of 1867 having been two thousand two hundred and sixty-five dollars and nineteen cents.

Is the instrument in question a valid mortgage? is, therefore, the question submitted to me upon the depositions of Potter, Denison, and Colwell (their counsel) on the one side, and of Dow and Anthony (late of the firm of P., D. & Co.) on the other, and the documentary evidence, and the elaborate arguments of the learned and indefatigable counsel.

The instrument relied on by the petitioners is a chattel mortgage in the common form, dated December 24th, 1867—acknowledged the same day, and lodged for record December 26th, 1867—the consideration named being two thousand two hundred and sixty-five dollars and nineteen cents; and the notes secured, being six in number, each for the sum of three hundred and seventy-seven dollars and fifty-one cents, with interest from December 24th, at bank rates, and payable respectively, one on the 1st of March, 1868—the others six, nine, twelve, fifteen, and eighteen months after date. The ordinary provisions in favor of the mortgagee, including a power to sell on breach of condition, are embodied in the deed, and the description of the property conveyed, is as follows:

"The articles of personal property enumerated and described in the schedules and bills, marked respectively A, B, C, and D, hereto annexed, and constituting a part of this mortgage, meaning and intending hereby to convey, as well the articles mentioned in said schedules, upon which repairing, labor, and work has been done, as those charged and mentioned in said schedules, as furnished to said Joseph Dow by the said Potter, Denison & Co., said articles now being situated in the house occupied by said Joseph Dow in said Providence."

The schedules referred to, A, B, C, and D, are simply the four pages of a bill of parcels and charges of Potter, Denison & Co. (dealers in household furniture), against said Dow—the first twenty charges being under dates of May 31 to August 8, amounting to about one hundred and sixty dollars, the others, amounting to over two thousand dollars, being under dates of September 9 to November 30. But these schedules, although attached to the mortgage, and although left with it at the office of the city clerk (as is shown by his indorsement upon the instrument), *were not in fact recorded*, so that the record book gave to inquirers only the information contained in the description above quoted.

And upon this state of facts the counsel for the trustee maintains that his client, stopping here, is entitled to a judgment in his favor, because, firstly, a mortgage, to be of avail against a *bona fide* purchaser or an attaching creditor, must, by our statute, be a recorded mortgage, and the assignee or trustee under the Bankrupt Act takes a bankrupt's property as a *bona fide* purchaser for value, as a creditor would; and, secondly, the instrument here relied on as having been recorded, inasmuch as without the schedules it was unintelligible, ought to be, and must be treated as a nullity.

Two questions are here presented, each of interest and importance. Upon one only, however, is it necessary here to express an opinion. If, as maintained on behalf of Potter, Denison & Co., an assignee or trustee in bankruptcy is to be regarded as standing in the shoes of the bankrupt—as, in contemplation of law, a *party* to the transactions in which his assignor was a party, then it matters not to inquire whether the mortgage in this case was fully and effectually recorded or not, or whether or not it was recorded at all. On their behalf, in direct antagonism with the assumption on the trustee's part, it is contended that the assignee takes the property of the bankrupt, subject to all equities and liens (other than certain attachments) as held by him; and, consequently, that as the mortgage in question, under our State law, was valid as between Dow and the grantors, though not recorded, it must

be held valid between Dow's trustee and them. And in this construction of the law I am constrained to concur, after a deliberate consideration of the authorities referred to, and the arguments submitted by the learned counsel of the trustee in support of his position. My learned predecessor, as I am credibly informed, gave to the law this construction, and more recently the learned judge (Lowell) of the Massachusetts district, *in re* Griffiths, 3 N. B. R., 731, has favored the Bar and Bench with an exhaustive opinion in support of that construction. A sufficient answer to the counsel's labored and ingenious argument, grounded on the proviso referring to mortgages in the 14th Section of the Bankrupt Act, is found in this opinion, in these words: "The proviso appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages should be affected by the assignment, and not with any view of construing the law regarding record." Such has been my view of this proviso since, years ago, I was first called on as counsel, to advise concerning its meaning, and such, too, is the view of Chief Justice Chase, as I infer from his language reported *in re* Wynne, 4 N. B. R. Nor am I prepared to admit, as contended at the Bar, that the opinion of Judge Blatchford, in 1 B. R. 162, cited by counsel, is not in harmony with this ruling of Judge Lowell. Under the statute of New Jersey, which Judge Blatchford was bound to regard, he could not rule, in the case before him, otherwise than he did. *In re* Metzger, 2 N. B. R., 355, I fail to find in the opinion of Judge Hall anything inconsistent with the ruling of Judge Lowell, *in re* Griffiths.

Adjudging, as I do, that the mortgage in question is not invalid for lack of proper registration, I proceed to treat of the other objections to the claim of the petitioners.

On behalf of the trustee, it is strenuously contended that upon the evidence said Dow is chargeable, in view of this mortgage transaction, with fraudulently preferring his creditors, Potter, Denison & Co., he being insolvent; and that Potter, Denison & Co. are chargeable, both with knowledge of his insolvency and knowledge of his fraudulent intent, as punitive

consequences of which, Dow forfeits all claim to a discharge, and the petitioners not only are barred from claiming under their mortgage, but also are barred from proving their claim against the bankrupt's estate and sharing in the distribution of his assets.

The answer of the petitioners to these allegations is two-fold. The first is, that assuming the allegations of the fact to be true, the trustee is estopped from impeaching the transaction, because the proceedings in bankruptcy against Dow were not commenced until six months (less one day) after the act of preference—and not within four months, as expressly required by the first clause of Section 35 of the Bankrupt Act. After the lapse of four months, say they, the preferences—simply *preferences*—which an insolvent debtor may have made, are to be held valid as against all the world, so far as the preferred creditor is concerned. And this, in my judgment, is a sufficient answer. Nor am I aware that in thus ruling, I indicate dissent from any judicial opinion, or dictum even, to which my attention has been directed, or which has come under my observation. That my ruling is in harmony with the views of the distinguished framer or father of the Bankrupt Act, is evidenced by the *Congressional Globe* of March 27, 1866, page 1693, in the report of a colloquy between Mr. Jenckes and a fellow-Representative, concerning the proviso of which I have above spoken.

A second answer of the petitioners is an emphatic denial that Dow was insolvent in December, 1867, or then contemplated bankruptcy or insolvency, or that he or the petitioning creditors, in fact, gave a thought to that act, when the petitioners pressed for, and obtained a mortgage upon the goods they had themselves furnished or repaired, within the preceding ninety days, to secure payment for them within the eighteen months next to ensue.

Of this second answer of the petitioners, under my ruling as above stated, it would be unnecessary to speak, did not the trustee further contend, that inasmuch as the mortgage in question was a transfer or conveyance of property within six months before the commencement of proceedings in bankruptcy, it is to be held void, and is moreover *prima facie* evidence of fraud,

not being made in the usual and ordinary course of business of the debtor; contending also, of course, that the proofs bring the case within the provision of the second clause of Section 35 of the Bankrupt Act, which is as follows:

"And if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

To this claim on behalf of the trustee, as to the other, a twofold answer is given by the petitioners. They deny, as before, that the facts warrant the conclusions which the trustee deduces from them, and on their part contend that the clause of Section 35 above quoted, has no bearing whatever upon a case of preference by a bankrupt of a creditor's claim, which is, say they, the offense, and the only offense of which the bankrupt Dow is to be suspected even, upon the evidence.

And in these views of the petitioners, both as to the bearing and effect of the proofs, and as to the construction of the statute, I concur. The statute recognizes—nay, demands—that we make a distinction between a preference to a creditor and a sale, transfer, or conveyance to one not a creditor; and when this required distinction is made, it is manifest that to the claim of the petitioners, the trustee makes no sufficient defense.

This construction of the law, by the way, I find to be in harmony with the views entertained by my learned predecessor, Judge Bullock, as indicated *in re* Hunt, 2 N. B. R., 539.

The facts brought to view by the testimony are eminently exceptional, constituting a case strictly *sui generis*.

The bankrupt Dow, in June or July, 1867, conceived the idea that to lease a spacious mansion-house on the corner of Waterman and Benefit streets, in Providence, for a term of ten years, and fit and furnish it as a *quasi* infirmary, with all conveniences for resident patients and all needful arrangements for bathing, *à la Turque*, and otherwise, for the public at large, would be a profitable enterprise. His income from his profession, as a physician, for two years preceding, had averaged from four to five thousand dollars per year, and he had of his own, or within his control, some five thousand dollars of the ten thousand dollars of capital deemed needful for the proposed undertaking, according to the estimates of the builders, furnishers, and artisans with whom he consulted. At that time, even before leasing the house above mentioned, he conferred with Denison, of the petitioning firm, concerning the furnishing of the house, stating what was his income, his means, and his purposes, and stating also that he should be obliged to ask credit for the furniture he should need, to cost, as he estimated, about a thousand dollars or more. The responses of Denison, it would seem, were in accord with Dow's wishes, as he undeniably understood that for any goods purchased of Potter, Denison & Co., should he need them, he would not be expected to pay until able to do so from his earnings as a physician, and the income and profits from his infirmary and bathing establishment. What were his representations to other parties with whom he proposed to deal, we are left to surmise; that he was not equally ingenuous in his statement to them, is not shown by any testimony, nor even asserted *arguendo* by counsel.

In July he took possession of the Waterman street estate under try lease, and proceeded to arrange and adapt it to his purposes, employing, of course, laborers, carpenters, masons, plumbers, and other artisans, and contracting debts with car-

pet-dealers, crockery-dealers, and other traders, and in September, October, and November, ordered and received from Potter, Denison & Co., wares and merchandise to the amount (including a few charges for repairs of some articles of furniture), two thousand two hundred and sixty-five dollars and nineteen cents. It does not appear that until about the middle of November, anything was said to the doctor by any member of the firm concerning the amount of his account, or its settlement in any mode. Then, however, for the first time, he was called upon by Mr. Potter, whom he had never before seen, who introduced himself as senior partner of the firm, and after premising that the doctor's bill had swollen to a large amount, suggested that its payment in full, or in part, was desirable upon several grounds. To this the doctor replied with commendable frankness. He said he had not now the money in hand to discharge this debt, or certain other outstanding claims incurred in fitting up his establishment, not as yet fully, though about completed. He had expended and paid out all the money which he had at the outset, but, as his outlays, instead of coming within ten thousand or eleven thousand dollars as he had estimated, had amounted to about fifteen thousand dollars, he was at the stand as to what he should do. But as to the firm's claim, he had to say that he was surprised that a call for payment was made now, because it was understood and agreed that he was to be allowed a credit, and, but for that agreement, he would not have purchased the goods. To this, Mr. Potter's reply was, that the firm's terms were cash; that he, Potter, was the financial manager of the firm; and that Mr. Denison's agreements as to credit were not recognized as binding. Besides, the bill was for about twice the amount it was expected to be by Mr. Denison, and the firm needed the money. Between the doctor and Mr. Potter there were two or three interviews within the succeeding month, and Potter, ascertaining that the doctor could not, or would not, by borrowing or hiring, procure for him the money, at last insisted that he should give him notes for the amount of the debt, secured by mortgage of the goods specified in the bills rendered; and the doctor, after resentfully declining to

give a mortgage, because the claim was already safe enough, and he confidently expected soon to be able to pay all his debts from his earnings and the profits of the new business in which he had engaged, and after proffering to Potter a return of the goods, which he declined accepting, finally consented to execute the mortgage, which Potter had caused to be prepared by his own attorney from instructions given (as I understand the testimony) before the debtor had agreed to give a mortgage, if not before the giving of one had been a subject of negotiation.

At this date (December 24, 1867, the new establishment not, in fact, in operation) it is not shown or insinuated that any person other than the petitioning firm entertained a doubt of the success of the doctor's experiment. And whether, even at the date of the proceedings in bankruptcy (June, 1868), the doctor himself, or the mass of his creditors, had become skeptical or despondent in this regard, is matter of question: for (an exceptional fact this certainly!) it appears that before the petition in bankruptcy was filed by Phillips & Co., that firm and other creditors called on the doctor and asked him if he was willing they should put him into bankruptcy? To which he answered: "I thought it would injure my business; but I was in the hands of my creditors, and they must do what they thought best." He had, however, at the same interview, before any allusion to bankruptcy, told these gentlemen that he "didn't know of any other way to free himself from his embarrassment, but to give a mortgage on the improvements and fixtures of the leased estate, and get a loan, and pay all his creditors;" thus showing, that he, at least, in June, 1868, considered himself able to pay all his debts. And then—"in the hands of his creditors"—they file a petition in bankruptcy against him, on the 23d of June, containing charges as above quoted; on the 29th of June they obtain an injunction against any proceedings under their mortgage by Potter, Denison & Co.; on the 8th of July, Dow is adjudged a bankrupt on default; on the 27th of July all the creditors (saving P. D. & Co.) prove their claims and unanimously appoint a trustee to manage the

estate; which trustee permits the entire property of the bankrupt to remain in his possession in use by him as originally contemplated, for an infirmary, bathing establishment, and boarding-house, down to this hour—not only without paying for the use of said property, but without even agreeing or promising ever to pay for that use, meanwhile persistently resisting the claim of the petitioners for the mortgaged property or its appraised value.

Now, without controverting divers familiar rules and maxims of law, cited on behalf of the trustee, I fail to find any sufficient ground in the evidence submitted for adjudging that Dow, in December, 1867, was insolvent, or contemplated bankruptcy or insolvency, or that, in making the mortgage in question, he even thought of the Bankrupt Act, much less deliberately resolved and intended to violate some of its wholesome provisions. It is true, that there were then outstanding claims against him, which he had not the money in hand wherewith to pay; but, on the other hand, it does not appear that any of these were then due under the arrangements and understanding between him and his creditors; while it does appear that all the property and effects, in procuring which these debts had been contracted, and some five thousand dollars of his own earnings been expended, were still in his possession, uninjured and undecayed; that his health was as vigorous, his skill as unquestioned, his character as untarnished, his credit as good, his friends, sympathizers and patients as numerous and zealous, and, finally, the enterprise of business in which he had just engaged as promising *in prospectu*, as ever before. Indeed, as we have seen, his business, in arranging for and establishing which his pecuniary obligations, then yet to mature, had been incurred, had not then commenced. To adjudge that he was then insolvent, within the reasonable intent of the Bankrupt Act, were to do what no court has yet done, and what the court of this district will not be the first to do. To adjudge that the petitioners were privy to a fraudulent intent on the part of such a debtor, in whose mind it must, upon the evidence, be conceded no such intent ever had birth or dwell-

ing-place, were to do what were even more culpable, if that were not an impossibility.

The petitioners wisely asked security for their debt upon the property they had agreed to sell upon a credit. Their debtor gave it, as was indisputably his right to do, both he and his grantees being, of course, bound to know that until four months should have elapsed the transaction would be impeachable, and for adequate cause be branded as void and fraudulent. They are not shown to have violated any law, nor, so far as appears in the proofs, any private pledge or stipulation, or any wholesome custom of trade. My judgment upon the issue presented is in their favor, with costs of suit, if, in this form of proceedings, costs are taxable. Of the action of the other creditors of Dow, under whose order and direction the trustee has so long resisted the claim of the petitioners, I refrain from speaking.

The Bankrupt Act, it must not be forgotten, is designed and suited not only to thwart and defeat the machinations of the knavish bankrupt colluding with a rapacious mortgagee to hinder, delay and defraud the mass of his creditors, but also, and equally, to thwart and defeat the machinations of a body of creditors colluding with a demoralized or faint-hearted bankrupt to annoy, worry, delay, and wrong an innocent mortgagee. Says Chief Justice Chase, 4 B. R., "It is as much the policy of the Bankrupt Act to uphold liens and trusts when valid, as it is to set them aside when invalid."

A decree was entered in accordance with the opinion, and the court adjourned to September 7th.

UNITED STATES CIRCUIT COURT—ILLINOIS.

The plaintiff, immediately previous to his bankruptcy in March, 1842, had a fee-simple title in Sand street, subject to the public easement, which street then terminated in Lake Michigan, but more than four hundred and fifty feet of accretion now exists between Sand street and the present lake shore.

Kinzie v. Winston.

Held, that the interest of Kinzie at the time of his decree in bankruptcy, in Sand street, was property within the meaning of the Bankrupt Act of 1841, which passed by the decree to the assignee, and by *mesne* conveyances came from him to the defendant, and that the right of accretion was a vested right inseparably connected with the legal title, and passed with it to the assignee.

ROBERT A. KINZIE *v.* FREDERICK A. WINSTON.

WILLIAMS, J.—This was an action of ejectment, brought for the recovery of the possession of so much of the lands lying east of block 54, in Kinzie's addition to Chicago, as is contained in lots 1, 2, 3, 16, 17, and 18, as numbered on the recorded plat of Ogden & Lombard's sub-division of the accretion east and adjoining lot 12 of Legg's sub-division of block 54 of Kinzie's addition to Chicago.

The plaintiff was the purchaser from the United States, and, at a later day, the patentee of the north fraction of section 10, T. 39 N., R. 14 east of the 3d principal meridian, which, on the 22d of February, 1833, he platted as Kinzie's addition to Chicago, and, upon the same day, caused the plat to be duly recorded in the recorder's office of Cook county. The plat was acknowledged and recorded three days before the passage of the act of our Legislature, by which the fee-simple title in the streets of plats thereafter acknowledged and recorded became vested in the public. The streets of Kinzie's addition are therefore not governed by the provisions of our statute, but the rights of the public and of private persons are controlled by the common law. Block 54 is the northeast block of Kinzie's addition, and a fractional block; a strip in the front of said block, extending south beyond the centre of said block, being cut off by Lake Michigan. The only portion of said Sand street (the street east of block 54) which appears from the recorded plat to have remained above the waters of Lake Michigan, is a strip extending from the south to the north and terminating in a point somewhere upon lot 12. Sand street is laid out sixty-six feet in width, and the strip of land in Sand street in front of the south part of block 54 is in no place, as it would appear by the plat, thirty-three feet wide. The fact that this strip of land in Sand street bordered upon Lake Michigan, gave to the owners thereof riparian rights,

which, in process of time, have become of great value, and hence the present litigation in reference to some of the lots laid out upon the accretion.

It would now be difficult to determine precisely when the alluvion commenced to form upon this strip of land in Sand street. The plaintiff claims that it did not commence forming until the years 1844 or '5; the defendant that it began as early as 1840. By gradual increment the land has extended east of block 54 until it is now alleged that more than four hundred and fifty feet of accretion exists between Sand street and the present lake shore. The lots now in controversy are a part of this alluvion. On the 18th of March, 1842, the plaintiff was declared a bankrupt under the provisions of the act of 1841, and the defendant claims through *mesne* conveyances from the assignee in bankruptcy. The plaintiff insists that the assignee in bankruptcy took no title in Sand street by the decree, and that the title and the subsequent accretions now belong to him (Kinzie).

It is admitted by all parties that the interest of Kinzie immediately previous to the decree in bankruptcy, was a fee-simple title to the strip of land above described as existing in Sand street, subject to the public easement. And the first question in this case is that asked in the brief of the learned counsel for the plaintiff, "Was this naked fee thus subject to a perpetual right of use in the public property, or a right of property in Kinzie, in the sense in which those terms are used in the Bankrupt Act of 1841? Was it ever contemplated by the framers of that statute, that by its operative power there should pass to the assignee in bankruptcy title to all the streets or public grounds dedicated to public use in our great cities by the bankrupt?" In attempting to answer this question in the light of legal principles and adjudged cases, I shall, for the present, assume the position of plaintiff's counsel to be correct as to the time when the accretions began to form; that is, that they began to form as late as the year 1844, and two years subsequent to Kinzie's discharge in bankruptcy.

The 3d Section of the Bankrupt Act of 1841 is as follows: "And be it further enacted, that all the property and rights

of property of every name and nature, whether real, personal, or mixed, of every bankrupt, except as is hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall by mere operation of law *ipso facto* from the time of such decree, be deemed to be divested out of such bankrupt, without any other act of assignment or other conveyance whatever, and the same shall be vested by the force of the same decree in such assignee as shall from time to time be appointed by the proper court for this purpose."

In the language of the plaintiff's counsel "there was nothing there but a small point of land lying next the lake, every point of which had, in 1833, been dedicated to the public use as a street," and that right was one existing (or which might exist) in perpetuity in the public. The right of Kinzie in Sand street in March, 1842, was considered to be of very little value. Kinzie's naked fee in the street, if put up at public sale by the assignee, would probably have sold for only a nominal price.

And the question recurs, was that interest "property" or "right of property," within the meaning of the 3d Section of the Bankrupt Act?

"Property (says Bouvier), is the right and interest which a man has in lands and chattels. Burrell defines property to be 'that which is proper or peculiar to one; that which is one's own; that to which one has an unrestricted or exclusive right, including all that is one's own, whether corporal or incorporal.'"

Again, the same author defines property to be "the exclusive right of using and disposing of a subject as one's own." This is the strict legal sense of the word, as in the expression "property in land, property in chattels."

"Property has been judicially defined the right one has in lands or chattels."

6 Binney, 94; 17 John., 283; 1 Comstock, 20, 24; 3 Kernan, 396.

All these definitions ignore the idea of value in the thing owned. If there is an exclusive right to a thing, the law immediately presumes it to have at least a nominal value to the

owner. And this right cannot be invaded without subjecting the wrongdoer to at least nominal damages.

It was argued by the plaintiff's counsel, that the object of the Bankrupt Act was, from sales of the bankrupt's property to obtain money to pay the bankrupt's debts; and that the sale of the naked fee of Kinzie in Sand street, could have brought nothing with which to pay debts. But, if the language of the act is clear and distinct, we must determine from that what was the object of the act. And a fee-simple title to real estate, of however little actual value, would seem to be property by every accepted definition of the word. I have been referred to a number of cases in which the difference between easements in country roads and in city streets is discussed, and it is argued that Kinzie's right was not property, because it was a right in a street of a city, and the burden of public easement had, for all purposes of transfer, extinguished the fee. It is true that the public servitude upon a city street may be, and generally is, far more onerous than upon a country road, and that in the proportion the servitude is increased, the value of the fee is diminished. But the title of the owner of the soil remains unchanged, whatever may be the change in the nature of the servitude. The increase of the burden of the public easements only lessens the value of the owner's interest; it in no way changes its nature. And whether in the city or country, the owner of the fee retains every right not inconsistent with the necessities of the public. If the owner of the land over which a country road is laid retains an interest in all mines, quarries, timber, and earth, he retains it only so far as is compatible with the rights of the public in the highway.

If the owner of a street in the city has not the same interests, it is only because the public exigency is greater. If a street in a city is remote from the centers of trade; if it is so situated that it is seldom or never used as a highway, the burden of the urban servitude may possibly be no greater upon it than the burden of the rural servitude may be upon the country road. Sand street, in 1842, terminated in the lake upon block 54, and in no place in front of said block was it of any practical value

as a street. While therefore the fee in the street was then of but little value, by reason in part of the public easement, that value could hardly be said to be diminished by the fact that Sand street was within the corporate limits of the city of Chicago.

What were the rights of the plaintiff in Sand street upon the 17th of March, 1842? He had the present fee-simple title to the strip of land lying in Sand street, above the waters of the lake, subject to the rights of the public as a highway. He had, in conjunction with the public, a present possessory right in the street, and as against any one other than the public, he could maintain trespass for an invasion of his possessory rights. There are many cases that decide that such rights in the streets of a populous city are of only nominal value, but the position that such rights are not rights of property, cannot be sustained upon authority. Appurtenant to the fee-simple title, the plaintiff had the right to hold such title divested of the easement in case the public should, for any reason, permanently abandon the occupation of the street, and also the right to the accretions, should any attach to this strip of land. He was subject also to the loss of the soil by decrement, in case the water should encroach upon the shore.

It is said that this right to the reverter of the street (as it is called), in case of its abandonment by the public, and these riparian rights are "*possibilities*," and that the act of 1841 does not provide that possibilities shall pass to the assignee.

There is much force in the learned and elaborate argument filed by the plaintiff to show that *possibilities* are not covered by the Bankrupt Act of 1841. They were expressly named in the United States Act passed in the year 1800, but are not named in the act of 1841.

A possibility, says Burrill (2 Burrill's Law Dic., Art. Possibility), is "an estate founded on a contingency, which may or may not happen;" and it was an established maxim of the common law "that no possibility, right, title, or any other thing that was not in possession or vested in right, could be granted or assigned to strangers." 3d Wash. on Real Property, 89.

Were these rights to the so-called reversion, and these riparian rights "possibilities" within the legal meaning of that term? In a loose and general sense doubtless they were possibilities, for it was possible and not certain that the public might abandon its easement, and it was possible and not certain that accretions might attach to the existing soil.

But a legal "possibility" *is an estate founded on a contingency. First*, as to the so-called reverter, in case the public servitude should cease. Kinzie, on the 17th of March, 1842, had the highest estate known to the law in the soil of the street—a fee-simple title. The public had a possessory right, not necessarily exclusive, but consistent with an imperfect, uncertain possessory interest in the plaintiff. The right of the public was in the nature of an incumbrance upon the title of the plaintiff, and he held that title *cum onere*. In case the public abandoned its occupancy, the imperfect and uncertain possessory title which the plaintiff then held would have become perfect, and the plaintiff would have held the possessory title solely and absolutely as against all the world, as he then held the fee-simple title.

This *estate*, then, was *founded* upon no contingency, although the removal of the *quasi* incumbrance (the abandonment of the easement by the public) was a contingency upon which its value might be increased. It was not, therefore, in the eye of the law, a "possibility." If the fee of an estate was mortgaged to its full value, it would still be property, and the purchaser would take the title with the possibility of being able to compromise the mortgage debt for less than the full amount, or of discharging it by some legal defense; but the estate would not be founded upon a contingency. So a purchaser buys an estate subject to the contingency of its appreciation; but the contingency is not the foundation of the estate, but a mere incident of its existence. This public servitude upon Sand street was in the nature of a mortgage, which might and might not exist in perpetuity, and the possible increment or decrement in the land by the action of the lake, in the nature of a possible appreciation or depreciation in the value of an estate.

Second. As to the accretion. The right to alluvion was a right attached to the land, and he who owned the fee-simple of Sand street owned all that became attached to the shore.

"This right," says Washburn, "to alluvion is considered as an interest appurtenant to the principal land, and belonging, in the nature of an incident, to the ownership of that, rather than as something acquired by prescription or possession, in the ordinary legal sense of these terms." 3 Wash. on Real Property, 59.

"Alluvion becomes, as fast as it is formed, the property of the owner of the land upon which it forms." 3 Wash. on Real Property, 55.

"Before a proprietor can set up his claim to accretions and the like, he must show that he owns the shore." *Bates* v. *Ills. Cent. R. R. Co.*, 1 Black, 208.

The right of the proprietor of the shore to the alluvion formed thereon is a vested right, resulting from natural law in consequence of the local situation of the land to which it attached. *Municipality No.* 2 v. *Orleans Cotton Press*, 18 Louis, 123.

But we are not left without a construction by the courts of the language of the 3d Section of the Bankrupt Act of 1841.

Our Supreme Court has said (2 Gilman, 667):

"This language is sufficiently comprehensive to embrace the most minute and temporary interest in property."

And again:

"How more comprehensive language to vest the title in the assignee could have been employed, it is impossible to conceive. But lest a doubt might remain, the succeeding clause of the same section has, if possible, made it still more explicit, by providing that the assignee so appointed shall be vested with all the rights, powers, and authorities to sell, manage, and dispose of the same, subject to all the orders and directions of said court, as fully to all intents and purposes as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy, declared as aforesaid."

25 Ills., 548. See also 1 Peters, 218; 2 Story, 158; 23 Ver-

mont, 744; 1 Curtis, 232. I hold, therefore, that the interest which was held by Kinzie at the time of his decree in bankruptcy in Sand street, was property within the meaning of the Bankrupt Act of 1841, which passed by the decree to the assignee, and by *mesne* conveyances came from him to the defendant, and that the right of accretion was a vested right, inseparably connected with the legal title, and passed with it to the assignee.

To the same effect is the decision of the United States Court in *Banks* v. *Ogden*, 2 Wallace, 69:

"Upon Kinzie's bankruptcy, the fee of this strip of land (in Sand street) passed to the assignee. It was about this time, or shortly thereafter, that the alluvion began to form upon it, and continued to increase until the commencement of the suit below. The title to the accretion thus made followed the title to the land and vested in the assignee."

Though Kinzie was no party to that suit, and the statement may be regarded as a mere dictum, it still is a declaration of what I regard as the law applicable to this case, sustained upon principle and authority. This view of the case renders it unnecessary that I should discuss the question of fact, as to the time when the accretions began to form, nor whether or how far the Statute of Limitations affects the rights of the parties to this litigation.

The finding of the court is in favor of the defendant.

Scribner & Hurd, for plaintiff.

S. W. Fuller & Campbell, for defendant.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

Where a bankrupt died five months after filing petition, and his attorney asks for discharge on account of said death,

Held, that as the bankrupt had not taken the necessary oath in the 29th Section prior to his decease, and the same being necessary to the granting of a discharge, that it could not be given.

In re GUNIKE, *a deceased bankrupt.*

THIS case was determined by the court upon the following

state of facts: One Gunike applied in March, 1868, for the benefit of the Bankrupt Act, and filed his schedules. Warrants were issued, and the proceedings were all regular up to some time in July, 1868, when Gunike died. Since his death an assignee has been appointed and has made disposition of the assets, and the attorney of Gunike came in and asked the court for his discharge under the Bankrupt Law.

BLODGET, J.—This discharge is asked under the last clause of Section 12 of the Bankrupt Act, which reads as follows: "If the debtor dies after the issuing of the warrant, the proceedings may be continued, and concluded in like manner as if he had lived." It is contended on the part of the bankrupt, therefore, that, notwithstanding his death, a discharge from his debts should be granted; but, on examination of the 29th Section, it will be found that "no discharge shall be granted to any bankrupt until he shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act, as a ground for withholding such discharge, or as invalidating such discharge, if granted." This oath never having been taken by the bankrupt prior to his decease, and that being a condition precedent to the granting of the discharge, I am of the opinion that the discharge cannot be granted. There is no authority in the court to grant the discharge, until this oath has been taken by the bankrupt himself. No person can take it for him. The language of the last clause of the 12th Section, although very comprehensive, must, therefore, be taken as applying to such proceedings as may be taken by the assignee or other parties in settling the estate, as the making of dividends, etc.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where bankrupt refused to answer certain questions on the ground that they would criminate or degrade him,

***Held,* the assignee is entitled to the information; and the questions should be answered by bankrupt.**

In re RICHARDS.

I, JAMES F. DWIGHT, one of the Registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, and were stated and agreed to by the counsel for the opposing parties, to wit: Mr. James Matthews appeared for the bankrupt, and Mr. William Russell, who appeared for William A. Hall, the assignee of the bankrupt.

The following is a summary of the evidence upon the point to be submitted to the court.

The bankrupt on his examination, at the instance of the assignee, testified among other things as follows:

Q. 299. Have you kept any account of moneys paid out by you during the year? A. No.

Q. 300. Did you pay to Blake any money prior to the 24th December, 1869, for money borrowed by you of him? A. I do not remember.

Q. 301. Did you pay to Blake any money other than his salary and the amount stated by you to have been paid on the 24th December? A. I may have paid him others, but I do not remember whether I did or not.

Q. 302. Have you played cards, faro, or any other game of chance with Henry D. Blake during the year 1869? A. No.

Q. 303. You have not? A. No, sir.

Q. 304. Nor with Mr. Loomis? A. I decline to answer that question.

Q. 305. (By the Register.) Do you understand that your answer to that question would criminate or degrade you? A. I think it would, and I decline to answer on that ground.

Q. 306. (Mr. Russell.) Have you lost any money at games of chance during the year? A. I decline to answer that question on the same ground as I decline to answer the previous question.

OPINION OF THE REGISTER.

I think the assignee is entitled to the information, and that the questions should be answered by the bankrupt.

Which questions and opinion are respectfully submitted to the judge for decision.

JAMES F. DWIGHT, *Register.*

BLATCHFORD, J.—I concur with the Register in the view that the questions must be answered by the bankrupt.

UNITED STATES DISTRICT COURT—N. D. OHIO.

Joint assets are liable to the provisions of the Bankrupt Act, allowing exceptions. Where there are not sufficient individual assets, assignees cannot refuse to set aside exempt property out of joint property.

In re RUPP.

SHERMAN, J.—This case comes up on exceptions to the Register's report.

Two questions are raised:

First. Was Samuel W. Rupp a partner in the firm of George W. Rupp & Co.?

The testimony fully establishes the fact that he was a partner.

Second. Is George W. Rupp, the other partner, entitled to claim out of the partnership funds the exemption of three hundred dollars allowed by the laws of Ohio, in lieu of a homestead?

This question has heretofore been before me, and I have decided it in the negative on the ground that partnership funds are in the nature of trust funds, and are not liable to the separate and personal claims of the partners, until the partnership creditors are satisfied. The question was not examined with that care that its frequency and importance demand. I have now examined it, and in view of late leading cases, have come to a different conclusion.

By the common law, no exception or homestead is secured to a debtor. They both owe their creation to late legislation,

both by State and national authority. The policy of both has been adopted by almost if not all the States.

The object and policy of such laws, so universally adopted, cannot be disregarded.

The whole series of laws on these subjects are remedial, not restricting any prior right, but securing to an unfortunate debtor some portion from the wreck of his property to save him and his family from immediate want, and to encourage him to further efforts. They have been adopted from the humane policy of the law, and dictated by the enlightened ideas of the present day, as distinguished from the severe and unhumane laws towards unfortunate debtors that prevailed at no very distant period.

By them, the right of an individual debtor to the exemption is not disputed; and it certainly cannot be the policy of the law to permit the individual debtor to enjoy the exemption, while his joint liability with another would give the creditors the power to take the last cent of his property.

We find but few reported cases upon this point. *In re Radcliff* v. *Woods*, 25 Barbour, 52, the Supreme Court of New York, on a very similar statute with that of Ohio, held that joint ownership of property did not exclude the right; and the Court of Appeals, 37 N. Y. Rep., 356, say, "that the language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest that it assumes to protect is that belonging to the debtor, be it joint or several, absolute or limited." The United States District Court in Missouri, has also decided the point, 3 N. B. R., 441. Judge Treat there says, "The policy of exemptions and the legal rules on which they rest, modify the strict technical rules by which the rights of creditors are otherwise enforceable."

Such would also seem to be the policy of the Bankrupt Law. By the 14th Section there is saved to the bankrupt, personal property not exceeding five hundred dollars, to be excluded from the general assignment of his effects; while Section 36, which refers to partnerships and corporations, makes no dis-

tinction between that class of debtors and individuals, no language being used restricting in express terms or by implication the privilege secured by Section 14.

For the reasons above expressed, I am of the opinion that the exemption claimed by Geo. W. Rupp, bankrupt, should be allowed from the assets of the firm of Geo. W. Rupp & Co.

J. C. Hutchins, and *E. H. Ensign*, solicitors for Geo. W. Rupp.

Geo. P. Hunter, for assignee.

UNITED STATES DISTRICT COURT—NEW JERSEY.

An adjudication of bankruptcy may be made against one partner only upon a joint debt. The partnership creditor has such an interest in the separate property of any one of the partners, that he may proceed against one alone.

In re MELICK.

NIXON, J.—Benjamin Cole files his petition in this court, praying that one Isaac C. Melick be adjudged a bankrupt, and in his petition he sets out that the nature of his demand against the said Melick is a certain judgment obtained by him in the Supreme Court of the State of New Jersey, on the 10th day of June, A. D. 1870, against the said Isaac C. Melick and one Daniel H. Cole, late partners, and trading as Cole & Melick, for the sum of five hundred and six dollars and eighty cents damages, and forty dollars and sixty-five cents taxed costs of suit.

Various acts of bankruptcy are charged in the petition to have been committed by the said Melick, which are denied by the alleged bankrupt, and before the trial the said Melick appears by counsel, and moves the court to set aside the petition upon the ground that the debt proved is against the late firm of Cole & Melick, and that the proceedings in bankruptcy should have been taken, if at all, against both members of the firm.

This objection brings before the court the consideration of the question, whether the Bankrupt Law confers upon the court jurisdiction against one partner where the debt proved is a partnership debt.

The question is not a new one. It arose in the time of Lord Hardwicke, and he entertained such grave doubts upon the subject that he directed a trial before Lord Chief Justice Willes. The Chief Justice also doubted, and reserved the matter for argument by counsel before the Court of Common Pleas, which unanimously decided that a commission could be regularly issued in such a case.

Lord Hardwicke, in adverting to the case *ex parte* Crisp, says, "Whatever doubts I might have before, it is now established to be law, in the unanimous opinion of the Court of Common Pleas, that a commission of bankruptcy may issue against one partner only for a joint debt." 1 Atk., 134.

This early settlement of the question in England has been uniformly adhered to by subsequent Chancellors. It was recognized by Lord Loughborough, *ex parte* Elton, 3 Vesey, 239, and expressly acted on by Lord Eldon in *ex parte* Clay, 6 Vesey, 813, and *ex parte* Chandler, 9 Vesey, 35, and *ex parte* Bolton, 2 Rose, 389, where he says, "Since the case of *ex parte* Crisp, a decision now, at least, sanctioned by time, it has been clearly settled, that a joint creditor may take out a separate commission."

The same view of the question has been taken by the courts of this country. The case of *Tuckers* v. *Oxley*, 5 Cranch, 34, turned upon this, and all the reasoning of Chief Justice Marshall, in his able opinion, goes to the recognition of the principle, that the joint creditor of a partnership, upon the proof of his debt, is entitled to have a separate commission against any one of the partners.

In *Murray* v. *Murray*, 5 Johnson's Chancery, 60, Ch. Kent reviews the English cases with his usual learning and discrimination, and, although that case is principally taken up in discussing and stating the proper mode of marshaling the partnership and separate assets, in the payment of the partnership

and separate debts, yet it distinctly asserts the right, and in many cases the propriety, of a separate commission against one partner when the debt proven is a partnership debt.

But it was insisted upon the argument of the learned counsel of the alleged bankrupt, that the Bankrupt Act of 1867 has changed the law in this respect, and that Section 36 of that act was framed and designed to prevent proceedings in bankruptcy against one partner upon proof of a partnership liability. In the judgment of the court, counsel has misapprehended the object, purport, and scope of that section. It was inserted simply to indicate the correct and equitable mode of administration of the partnership property and separate estates of each partner, when "two or more persons who are partners in trade shall be adjudged bankrupt," and cannot be made to apply to the case under consideration, where only one of the partners is proceeded against. That section was first introduced into the Bankrupt Act of 1841, and, in its main features, embodied no new law, but was only declaratory of the equitable principles which the courts had adopted in the distribution of the bankrupt's assets. It was, nevertheless, proper and useful in this respect; that it put to rest the long mooted and much discussed question of the power of the Bankrupt Court in administering the bankrupt's estate, to make orders for the marshaling of assets and the payment of partnership debts with partnership funds, and separate debts with separate funds, without the intervention of proceedings by bill in equity. It required some such provisions to enlarge the jurisdiction of the Bankrupt Court, and to clothe its orders with authority, for before this time, as was quaintly said by one of the Lord Chancellors, each order seemed "to carry a chancery suit in the bosom of it," and thus involved greater delays and expenses in the equitable administration of partners' estates.

I do not now consider the other objection, urged in the argument against this proceeding, to wit: The practical difficulties which may arise in administering the joint and separate estates, where a joint creditor asks for a separate commission. This objection is addressed rather to the fears of the petitioning creditor than to the power of the court. There are, doubtless,

many difficulties in the proceeding. The relation which the assignee of the bankrupt will sustain towards the other partner, as to the right to administer and control the partnership property: how far the assignee, by an order of the court, and without the intervention of a bill making the other partner a party, can reach the joint assets: whether, if there be partnership assets and the other partner is living and solvent, and if there should be separate debts of the alleged bankrupt, the dividend of the petitioning creditor must be postponed until the payment of such separate debts; are all questions which have heretofore arisen, and have been the fruitful source of doubt and discussion, and may arise in this case.

But without expressing any opinion in reference to them, and looking to the single question now before me, I am constrained, upon principle and authority, to say that a partnership creditor has such an interest in the separate property of any one of the partners, that he may proceed against one alone upon the proof of his debt, and the motion to set aside this petition is overruled with costs.

W. L. Dayton and *J. N. Voorhees*, for creditor.

James Wilson, for debtor.

UNITED STATES DISTRICT COURT—NEW JERSEY.

M. A. C. and M. C. placed in the hands of J. L. J. money to be invested by J. L. J. in trust for their benefit. J. L. J. failed to so invest the money, but used it in his speculations. He afterwards became bankrupt, and M. A. C. and M. C. petitioned to have the assignee ordered to refund the money to them under the 14th Section of the Bankrupt Act.

Held, the prayer of the petition must be denied. Property held in trust does not pass to the assignee by the proceedings in bankruptcy, but it must be property that can be followed or distinguished. When the trust property does not remain *in specie*, but has been made way with by the trustee, the *cestui que trusts* have no longer a specific remedy against the estate, and must come in *pari passu* with the other creditors.

In re JANEWAY.

NIXON, J.—Application is made to the court on behalf of Mary Ann and Margaret Cool, creditors of John L. Jane-

way, bankrupt, for a rule to show cause why the assignee should not pay in full to these creditors, out of the assets of the bankrupt's estate, the sum of about two thousand five hundred dollars, which the said Janeway received of them in trust for investment, before his bankruptcy, but which he failed to invest, either in their names or in his own name, for their benefit. The evidences of his indebtedness, as well as the character of the debt, are found in three several memoranda given by the bankrupt to these creditors, as follows:

"FLEMINGTON, March 1, 1869.

"Received from Mary Ann and Margaret Cool, four hundred dollars and fifty-eight cents, to be invested for them.

"JOHN L. JANEWAY."

"FLEMINGTON, April 2, 1869.

"I have in my hands fourteen hundred and ninety-five dollars and eighty cents, of Mary Ann and Margaret Cool, which I hold to invest for them.

"JOHN L. JANEWAY."

"FLEMINGTON, June 7, 1869.

"Due Mary Ann and Margaret Cool, four hundred and thirteen dollars, which I hold to invest for them.

"JOHN L. JANEWAY."

It is claimed, on the part of the creditors applying for the rule, that these sums were not a loan to the bankrupt, but a deposit in his hands as trustee, and that they are entitled to be paid in full from the assets in the hands of the assignee, under the clause of the 14th Section of the Bankrupt Act, which provides that no property held by the bankrupt in trust shall pass by the assignment.

It is not pretended that the money deposited with the bankrupt for investment can be identified. It is assumed that it has gone into his general estate, and that the trustee, instead of making the promised investment, has used it in his speculations.

The principles which govern the case here presented are too well settled to be disturbed. It is true that no trust property is allowed to pass by the commission of bankruptcy from the bankrupt to the assignee; but it must be property that can be followed or distinguished. There must be some ear mark by which it can be recognized. As, for instance, where goods are sent to a factor to be disposed of, and the factor becomes a bankrupt, and the goods, yet in his possession, can be distinguished from the general mass of his property, the principal may recover them *in specie*, and is not obliged to prove his debt under the commission; and, even where the bankrupt has sold the goods, if he has kept the money received in the sale, in separate bags, the principal has been permitted to claim and hold the money against the assignee.

The Supreme Court of New York, *in re Kip* v. *The Bank of New York*, 10 Johnson, 65, went a step further, and held, that where the trust property had been sold, and the money deposited in bank in the individual name of one of the trustees, but kept separate from his other property, there was not such a blending of the proceeds of the sale with the private effects of the bankrupt, as to deprive the *cestui que trust* of his right to the same, against the claim of the creditors at large.

To bring the present case within these principles, it will be necessary for the applying creditors to point out the specific assets in the hands of the assignee, which is their property, and which they propose to appropriate to the payment of their claims; until this is done, the court feels constrained to adopt the rule as laid down by Hill, in his work on Trustees, to wit:

"Where the trust property does not remain *in specie*, but has been made way with by the trustee, the *cestui que trusts* have no longer any specific remedy against any part of his estate in his bankruptcy or insolvency, but they must come in *pari passu* with the other creditors, and prove against the trustee's estate for the amount due them."

The application must be denied.

UNITED STATES DISTRICT COURT—MAINE.

Upon proof of claim made by the father of a minor son, for the labor of such son, as an operative in the employment of the bankrupt within the six months next preceding the first publication of the notice of proceedings in bankruptcy,

Held, that the father is entitled to be preferred, to an amount not exceeding fifty dollars, according to Section 28.

In re HARTHORN.

I, CHARLES HAMLIN, one of the Registers of said Court in Bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the opposing parties, to wit: Mr. Ephraim Cunningham, creditor of said bankrupt, and Mr. William C. Crosby, assignee of said bankrupt's estate, viz.: said Ephraim Cunningham offers for proof a claim against said estate, amounting to the sum of one hundred and eight dollars, of which amount the sum of ninety-six dollars is for the labor of his minor son, Freeman Cunningham, performed as an operative in the employment of the bankrupt in the six months next preceding the first publication of the notice of proceedings in this bankruptcy.

Deponent claims the amount due for his minor son's labor belongs to himself as the father of the minor, and that fifty dollars thereof is preferred to himself under the provisions of Section 28 of the Bankrupt Act.

The assignee makes no objection to the amount claimed, nor to the same being allowed to deponent, as the father of the minor; but denies the right of the father to a preference under Section 28, as above, on the ground that it can only be allowed to the minor himself in those cases where the minor makes the proof in his own behalf.

I am of the opinion that, upon the strength of the authority of the case of *Thayer* v. *Mann*, 2 Cush., 371, deponent is entitled to the preference he claims.

And the said parties requested that the same should be certified to the judge for his opinion thereon.

Fox, J.—Ordered, that fifty dollars of the claim proved by Ephraim Cunningham, for services of his minor son, Freeman Cunningham, be allowed and paid as a preferred claim.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A bankrupt, in June, 1867, sold out the whole interest in his store. His petition in bankruptcy was filed in February, 1868. Between June and February he was out of business, except that he bought and sold apples, partly on his account and partly on a joint enterprise with another. He kept no books of account.

Held, that the omission to keep such books must prevent the granting of his discharge.

In re TYLER.

LOWELL, J.—The bankrupt kept a shop in Greenfield until the latter part of June, 1867, when he sold out his whole interest, including the good-will, for about two thousand two hundred dollars. His petition in bankruptcy was made in February, 1868. Between June and February he was out of business, excepting that he bought and sold apples, partly on his own account, and partly on a joint enterprise with one Mansfield. The only objection to the bankrupt's discharge which appears to be important, is that he kept no books of account. He testified that he kept none at all, and a person who was his clerk down to June, 1867, says he did keep one small book, but does not know what was in it.

He submits that he was not a merchant or tradesman by reason of his limited dealing in apples, and that his former business had been fully ended and disposed of long before bankruptcy. I have decided, in one case, that a trading which was wholly for cash, and was over long before the bankruptcy, leaving nothing for the assignee to inquire into, either in the way of debts, of credits, or of assets, did not make the bankrupt a tradesman within the act, at the time of bankruptcy, *in*

re Waite, 3 N. B. R., 10; and, in another case, I held that a clerk who happened to buy and sell certain horses and other personal goods, not intending, when he bought, to sell again, was not a tradesman. *In re* Rogers, 3 N. B. R. In these cases neither the letter of the law nor its spirit appeared to require a more strict construction, because, in the first, the accounting which the law exacts from traders was unnecessary, and, in the other, the character of a trader had never been assumed.

I regret to be obliged to say, in the present case, that the bankrupt does not clear himself from that objection. As I understand the evidence, the affairs of his original trade are, to some extent, still outstanding. Precisely what he received on selling out, and what he did with the money, are important inquiries to his creditors, which they have been unable to prosecute satisfactorily for the want of regular accounts; and, besides, I should infer that some of the debts proved against him relate to that very trade. The strict law applied to brokers must be enforced by the court until Congress shall choose to modify it, and it is within the scope of that law that the final winding up of a trader's business should be recorded, as well as its current course, and, unless a bankrupt can clearly show that everything has been so fully ended that no such account could affect his standing or touch the interests of the creditors at the time of his bankruptcy, I cannot hold him discharged for what was, at the time of the trading, an illegal act of omission. Perhaps it may help to express my opinion on this point if we suppose that full and perfect accounts have been kept and afterwards willfully destroyed before the bankruptcy; if it was certain that evidence was thereby lost, which was of present moment to creditors, the act would be immaterial, but the bankrupt must prove it to be so. Whether the dealing in apples constituted the bankrupt a tradesman within the statute, it is not necessary to decide. The distinction taken in England, whether every one who buys and sells goods is, *quo ad hoc*, a tradesman under Section 39 of our statute, may admit of question. And yet it is very difficult to draw any line founded

solely on the smallness of the transactions. It would seem that any one who buys on credit with intent to sell again at a profit, and who has no other regular business, is fairly within the mischief sought to be remedied by the act, though the buying and selling were a mere incident; as if a farmer should buy stock or grain in addition to what he raised—perhaps such a person could not properly be described as a tradesman. I am constrained to say that the omission to keep the books of the admitted trade not being shown to be immaterial to his present creditors, must prevent my granting the discharge.

G. W. Bartlett, for objecting creditors.

H. G. Parker, for bankrupt.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Property acquired in gaming is assets, which, if the bankrupt spends in gaming, he loses his discharge.

In re MARSHALL.

LOWELL, J.—The objection to the bankrupt's discharge is, that he lost a part of his property in gaming. The evidence tends to show that he was interested in a gambling-house in Boston, and that he did lose money at that house and in some others like it. The preponderance of evidence seems to support the allegation of losses sustained in that way.

On the other hand, the evidence for the defense tends to show that the bankrupt had lost all his property some years ago, so that whatever he may from time to time have made or lost he is no worse off now than if he had never lost at all. From this the argument is deduced that he never had any property to which creditors had a right to trust, and cannot justly be said to have lost any property in gaming. It is said that if the law should be rigidly applied in such a case, the creditors would receive an undue advantage, because they could always prevent the discharge of a person to whom they had

given credit with a full knowledge of the character of the business, and an understanding of its hazardous nature.

So far as this argument applies to gambling debts the bankrupt would have the remedy in his own hands, because the debts, if objected to, could not be proved against his estate; as it regards other debts, much of its force would depend on the circumstances under which each particular debt was contracted. A creditor may know that his debtor has property without knowing how he acquired it, or he may lend him money or sell him goods for some legitimate purpose, without reference to his occupation. And such are some, at least, of the debts in this case.

I am unable to see how I can limit the general language of the statute, though its effect may be, and I think is, to consider property acquired in gaming to be assets, which if the bankrupt spend in gaming he loses his discharge. It is impossible to look into the mode in which such property as the statute speaks of has been acquired. If property once in the possession of the bankrupt is spent in gaming, which if not so spent might be assets in bankruptcy, the case is made out. It is too late after it is spent to say that it was unlawfully acquired, or acquired in any particular way, or that creditors are no worse off on the whole. The case does not by any means show that whatever the defendant won was lost immediately, but rather that he had considerable sums at times which he afterwards lost. I cannot distinguish such losses from those which any other debtor might sustain in a similar way. The statute is clear and explicit, and cannot be construed away in favor of one whose profession is gambling, though its operation may be somewhat severe in such a case. Neither the knowledge of his creditors of his course of business nor any intent on his or their part is material. The fact only can be inquired into. Nor does the law in the matter of discharge invest the court with discretion as it does so largely in England. It is a mere question of legal right. Discharge refused.

S. J. Thomas and *Geo. F. Verry*, for objecting creditors.

J. Nickerson, for debtor.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A creditor recovered judgment and execution against a bankrupt in the State court. The bankrupt was subsequently arrested on the execution, and gave a recognizance before a magistrate to appear for examination under the laws of the State, for the relief of poor debtors. He appeared, and the examination was continued from time to time. The bankrupt, pending the examination, filed his petition in bankruptcy; an assignee was afterwards chosen. The creditor afterwards filed with the magistrate charges of fraud against the bankrupt, under the statute of the State.

Held, that such charges of fraud filed with the magistrate by the judgment creditor, are not a new suit which should be stayed under the 21st Section of the Bankrupt Act, and that the bankrupt was not entitled to a discharge from arrest.

MINON *v.* VAN NOSTRAND *et al.*

LOWELL, J.—The facts of this case as alleged in the petition or bill in equity and admitted in the answer are these:—In October, 1869, the respondents recovered judgment and execution against the plaintiff in the Superior Court for the County of Suffolk. The plaintiff was arrested on the execution in November and gave a recognizance before Mr. Coolidge, a magistrate duly authorized to act in the premises, to appear within thirty days thereafter for his examination under the laws of the Commonwealth for the relief of poor debtors. He did so appear and the examination was begun, was afterwards continued from time to time, and has not yet been concluded. On the 14th day of February, 1870, the plaintiff petitioned in this court to be adjudged a bankrupt, and has been so adjudged, and the first meeting of his creditors has been duly held and an assignee has been chosen and qualified. On the 25th day of March the plaintiff again appeared before Mr. Coolidge, according to the tenor of his recognizance, and after proving to the satisfaction of the magistrate the facts of his bankruptcy and the proceedings thereon, prayed that all further action under the execution be stayed until the question of his discharge should be determined in this court; and this being denied, prayed to be discharged from his arrest, which was likewise denied. The present respondents afterwards, on the same day, filed with said Coolidge charges of fraud against the plaint-

iff under the statute of the Commonwealth, when the above mentioned prayers were again renewed and again denied, and the case has been continued to the present time. It is further alleged that the charges of fraud are only cognizable in this court sitting in bankruptcy; and the prayer is for an injunction restraining the respondents from proceeding further under the execution and recognizance, and that the plaintiff be suffered to go therefrom without day and without molestation, and for general relief. The case has been conducted with great courtesy on both sides, and with a view of obtaining either here or on appeal a binding adjudication of the law upon the important points involved. I have already more than once decided that a debtor who is under arrest at the time his petition in bankruptcy is filed, cannot be relieved on *habeas corpus*. I came to this conclusion with reluctance; but it seems to be the necessary construction of the statute, and of the rule of the Supreme Court founded upon it, that the benefit of the writ was only for bankrupts arrested after they became such. And I have not changed this opinion. It may be that Congress hesitated to interfere with a consummated arrest under the apprehension that the debt might thereby be discharged and not be revived if the bankrupt should fail to obtain his discharge in bankruptcy, or it may be that the case was overlooked. However I may regret the fact, a bankrupt seems to be left, under such circumstances, to the operation of the laws of the State. Now, the law of Massachusetts is very peculiar. It professes to abolish imprisonment for debt, but really does so only in case the defendant shows his poverty, and besides comes within its definition of a fair and honest debtor. In respect to poverty, and even to property concealed or conveyed on a secret trust for the debtor's benefit, it would seem that all such inquiries have, after bankruptcy, devolved upon the assignee, who is bound to prosecute them for the general benefit of creditors, including the judgment creditor, and that all examination which is for the advantage of the latter only ought to be dispensed with. This was always my view of the operation of the insolvent law of Massachusetts, but I have no power to

require the magistrate to adopt it, and to admit the debtor to the benefit of the oath. This want of power is admitted, but the plaintiff's contention is, that the specific charges of fraud which the statute of the State authorizes the judgment creditor to make, and which, if duly alleged and proved, not only prevent the release of the debtor, but may subject him to punishment, are a new suit or proceeding against him which should be stayed to await the result of the proceedings in bankruptcy. Charges of fraud, some of which may concern only the peculiar relations of the two parties to the suit, may be made by the creditor, in writing, pending the examination before the magistrate, and thereupon the debtor is to plead to them, and the case proceeds before the magistrate like a suit at law, with a right of appeal and of an ultimate jury trial. If final judgment is against the defendant, he may be sentenced to the House of Correction for one year or to jail for six months, and *shall* lose all benefit of the law for the relief of poor debtors. This anomalous law has been decided to be constitutional, and to be of a mixed character, mainly civil, but partly criminal. Gen. Stat., c. 124, Section 10, and Sections 31–34. *Chamberlin* v. *H.*, 1 Gray, 172; *Parker* v. *Page*, 4 Gray, 533; *Stockwell* v. *Siloway*, 100 Mass., 298. No public prosecution is provided for, and it seems to result from the whole tenor of the act that the defendant may end the case at any time before the sentence by paying the debt and costs. Indeed, his recognizance in case of appeal is to surrender himself within thirty days after final judgment, *or* pay the debt. The whole proceeding, therefore, appears to be framed with a view of giving the creditor an extraordinary hold upon a debtor whom he supposes to be fraudulent, but with whose conduct public justice has no particular concern. I do not mean to be understood as throwing any doubt on the propriety of the decision which upholds the constitutionality of the law. The only question for me is whether the filing of such charges by a judgment creditor is a new suit which ought to be stayed under Section 21 of the Bankrupt Act, which prohibits the creditor, whose debt is provable under the act, from prosecuting to final judgment any

suit at law or in equity therefor against the bankrupt, and requires "any such suit or proceedings" to be stayed to await the determination of the court in bankruptcy on the question of the discharge.

It is argued with much force that "any such suit or proceedings include something more than any suit at law or in equity, and will cover any legal mode of enforcing payment of a provable debt." And I am very much inclined to think that this is so, and that a creditor who should undertake to prosecute a proceeding in admiralty, or to seize on execution after acquiring property of the bankrupt, would be within the scope, as he clearly would be *within* the mischief, of this section. If this be so, no creditor holding a provable debt can prosecute any proceeding for its recovery pending the bankruptcy. But the difficulty here is that all the original action is on the part of the debtor. He was under arrest before the proceedings, and the law has seen fit to provide that he shall not be released from such an arrest by *habeas corpus*.

It seems to me to follow that equity cannot relieve him, because equity, in such a case, follows the law, and never undertakes to relieve against lawful arrests. Then the debtor applies for the benefit of the State law, and that, unfortunately, gives relief only in certain cases. If the debtor can show a compliance with the law he is discharged, otherwise not. And the charges of fraud, though declared to be a sort of suit at law and to be conducted accordingly, are incidental not to the recovery of the debt, but to the attempt of the debtor to take the benefit of the statute. They are, says the Supreme Court of Massachusetts, "intended to be used as an answer or plea in bar to the debtor's application for the benefit of the act. No such charges can be made as an independent, distinct, substantial process against the debtor. They are only incidental to the previous proceedings commenced by him to obtain his release from confinement." *Parker* v. *Page*, 4 Gray, 533.

If this be the true nature of these charges, it is not a suit or proceeding to recover a debt, but a counter-plea to prevent the release of the debtor lawfully in arrest; and I cannot hold

that it ought to be stayed, because I should thereby give the debtor the benefits of the Massachusetts Act, without its disadvantages, and be in effect saying that the creditor might oppose his taking the oath if he would do it in a way which should be entirely agreeable to the debtor.

The bankrupt having before his bankruptcy given a recognizance to take the poor debtor's oath, or surrender, and the arrest not being avoided by the bankruptcy, I have no right to avoid it indirectly by requiring the proceedings under it and which are instituted at the debtor's instance, to be conducted in any particular manner, or to be stayed in part for his further advantage. The filing of the charges does not appear to be a suit or proceeding for the recovery of the debt more than would be a renewal of the execution, or the charging in execution, or any other matter incidental to the lawful arrest.

This is the whole gist of the case; I do not say that the magistrate ought not to admit him to take the oath, notwithstanding the charges; I have no right to meddle with that. There appears to be some reason to suppose that the Justices of the Circuit Court may entertain a different opinion of this question, and I need not say that I shall cheerfully acquiesce in any rule they may lay down. I cannot act upon anything short of such a rule, excepting my own opinion of the true construction of the law.

The answer of the defendants brings up the whole merits of the case, and my decision is intended to be final in this court so as to allow of an appeal. It is that the bill be dismissed.

C. R. Train for plaintiff.

Rodney Lund, for respondents.

UNITED STATES DISTRICT COURT—WISCONSIN.

In an indictment under Section 44 of the Bankrupt Act, for fraudulently obtaining goods on credit, the proceedings in the Bankrupt Court must be pleaded and proved with such particularity as to show affirmatively that an adjudication of bankruptcy was made upon a case in which the court had jurisdiction.

United States v. Prescott et al.

The indictment therefore should set out the filing of the petition, the name of the petitioning creditor, the amount of his debt, the alleged act of bankruptcy, and the adjudication of the Bankrupt Court.

The description of the goods obtained must be as certain as it can reasonably be made. It should be as definite as would be required in a declaration in trover.

Offenses under Section 44 are misdemeanors, and the word "feloniously" should not be used.

UNITED STATES *v.* PRESCOTT *et al.*

THIS was a motion to quash an indictment under Section 44 of the Bankrupt Act, for fraudulently obtaining goods on credit.

MILLER, D. J.—The first count of the indictment charges that on a certain day mentioned, in the District Court of the United States, for the District of Wisconsin, under and pursuant to an Act of Congress, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, proceedings in bankruptcy were duly commenced against Alphonso Prescott, Leander F. Snyder, and R. H. Lovell (whose full Christian name is to the said grand inquest unknown), as insolvent debtors, and partners under the name of Prescott, Snyder and Lovell, who thereupon afterwards, *to wit*, on a certain day mentioned, were adjudged bankrupts; that prior to the dates last aforesaid, and within three months before the commencement of said proceedings in bankruptcy, *to wit*, on the 16th day of August, 1869, within the jurisdiction of this court, and at and in the District of Wisconsin, the said Alphonso Prescott, Leander F. Snyder, and R. H. Lovell, then and there representing themselves to be associated together as copartners, under the firm of Prescott, Snyder and Lovell, and holding themselves out as wholesale merchants and jobbers of boots and shoes, under the false color and pretense of carrying on business and dealing in the ordinary course of trade of wholesale boot and shoe merchants and jobbers, did then and there wrongfully, unlawfully, and feloniously obtain on credit, from one Lyman Dike, certain goods and chattels, *to wit*, a large quantity of boots and shoes, of the value of five thousand dollars, with the intent then and there by the obtaining of said goods and chattels, to defraud the said Lyman Dike, contrary to the statute of the United States in such case made

and provided, and against the peace and dignity of the United States of America.

There are other like counts of the indictment, except as to the names of persons from whom goods had been obtained by defendants.

It is alleged in the motion to quash the indictment that it is defective in not setting forth the manner in which the proceedings in bankruptcy were commenced, and also in the description of the goods, etc.

The court exercises jurisdiction in bankruptcy as limited by the act; and proceedings must be commenced and prosecuted substantially as the act directs. Neither as to the proceedings nor jurisdiction of the court in bankruptcy, is it sufficient, in an indictment under the act, to rely merely upon a general averment. All matters necessary to constitute the offense must be pleaded. It is not sufficient, as in this indictment, to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven, in order to convict, that a petition in bankruptcy was presented to the District Court by a certain creditor; naming him, and also the amount of the debt of such petitioning creditor, and the alleged cause of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the creditor had a right under the law to commence and prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction.

Of the Bankrupt Consolidated Act of 12 and 13 Victoria, Section 44 of the act under which the indictment in question was framed is almost a literal copy. Several decisions of courts in England, as to requirements in the prosecution and trial of indictments under their act, were made and published before the passage by Congress of our Bankrupt Act, and to which I refer as proper for consideration: *Regina* v. *Lands*, 33 English Law and Eq. Reports, 536; *Regina* v. *Ewington*, 41 English Common Law Reports; *The King* v. *Jones*, 24 *Idem*, 156. It must appear that the bankrupt obtained goods within three months of the bankruptcy, by means of a repre-

sentation which he knew to be false; that he was carrying on business and dealing in the ordinary course of trade, and such representations must be actually made by him. *Regina* v. *Boyd*, 5 Cox, 502.

The description of the goods obtained by defendants is too uncertain; instead of a large quantity of boots and shoes, a certain number of pairs of boots and also of shoes, or a certain number of packages in boxes of boots, and also of shoes, should be described. This could be ascertained from the bills of sale. The description of the goods in an indictment should be as definite as in a declaration in trover.

The word feloniously should be omitted in indictments under the act. The offenses made indictable are misdemeanors. And in drawing indictments, figures for dates should not be used.

This being the first indictment in this court under the Bankrupt Act, I have prepared this opinion as a guide to the District Attorney in future.

The indictment will be quashed.

James G. Jenkins, for the motion.

Hazleton, District Attorney, *contra*.

UNITED STATES DISTRICT COURT—OREGON.

1. A judgment taken contrary to the Bankrupt Act is not void, unless a petition in bankruptcy is filed by or against the debtor within six months from the entry of the judgment.
2. A judgment by confession is not void under the code for want of a sufficient statement of the facts out of which the indebtedness arose, except as to the creditors who have acquired a lien upon the debtor's property before a sale upon the confessed judgment. *Quære*, whether such judgment is even then void if it can be shown by evidence *aliunde*, that the judgment was in fact given in good faith and for an actual debt?
3. The District Court has jurisdiction to ascertain and liquidate all liens upon the bankrupt's property, and in the exercise of this jurisdiction may enjoin a creditor from enforcing a judgment in a State court against the property of the bankrupt; but after the process of the State court has been executed by a sale of property, the District Court will not interfere.

4. A stipulation in a judgment that the interest on it shall bear interest if not paid annually is void, and does not make such judgment usurious.

In re FULLER.

DEADY, J. — Price Fuller was adjudged a bankrupt in this court on December 20, 1869, upon his own petition therefor, filed on the 18th of the same month.

On March 27, 1869, the bankrupt confessed judgment without action in the Circuit Court for the county of Benton, in favor of Green B. Smith, for the sum of two thousand six hundred and sixty-five dollars, with interest payable annually at one per cent. per month, and, if not so paid, to be considered as principal and thereafter to draw the same rate of interest as the original principal. The confession states the origin of the indebtedness for which the judgment was confessed as follows:

"The facts out of which said indebtedness arose are these: for money, gold coin, borrowed of and in hand paid to me, the said defendant, by the said Green B. Smith."

At the date of this judgment, the bankrupt owned two tracts of land in Benton county, one containing six hundred and forty acres and the other about twenty-three acres. The judgment was duly docketed on the day it was confessed, and thereafter became a lien upon the real property aforesaid. On November 20, said Smith sued out execution upon said judgment, upon which the sheriff of the county aforesaid, on December 2, 1869, sold of the personal property of the bankrupt what brought at such sale fifty dollars and fifty cents; and on December 24, 1869, said sheriff sold upon said execution the first-mentioned tract of land aforesaid, to one Thomas Reed, for the sum of two thousand seven hundred and fifty dollars; and on January 7, 1870, said sheriff levied upon the second-mentioned tract of land aforesaid, and was proceeding to sell the same on January 10 thereafter, when he was enjoined by the process of this court.

On January 4, 1870, the bankrupt filed a petition in this court, praying that the sheriff aforesaid be enjoined from paying over to said Smith any of the proceeds of the sale of the

real property aforesaid, and from selling upon said execution any of the real property of the bankrupt. On reading and filing the petition, an order was made allowing the writ of injunction as prayed for.

In addition to other facts above stated, it was alleged in the petition that the property aforesaid would not fetch so much at the sheriff's sale as upon a sale by the assignee, because of doubts existing as to the legality of a sale by the former; and that if the property already sold were re-sold by the assignee, it would, in the opinion of the petitioner, bring three thousand dollars; and that said Smith, at the time of accepting the confession of judgment aforesaid, "knew the petitioner to be insolvent." On July 11, Smith applied to the court for an order modifying the injunction so as to permit the sheriff to pay over the proceeds of the property sold before the service of the injunction.

By agreement between counsel for the application and the assignee (who had been appointed since the allowance of the injunction), the motion was heard on July 18. On the hearing, among other papers in the case, counsel for the assignee read a paper, verified by said Smith on January 27, setting forth the nature of his demand against the bankrupt, the consideration thereof, what security he had therefor, as above stated, and that the property aforesaid is not worth more than his claim, and "prays that the money in the hands of the sheriff and the property remaining unsold be released to him."

Upon these facts the reasonable inference is that Smith took this judgment in violation of the Bankrupt Act. It was taken with a knowledge of Fuller's insolvency, and therefore must be presumed, in the absence of any evidence to the contrary, to have been taken with the belief that a fraud on the act was intended. But as the judgment was given more than six months before the filing of the petition by the bankrupt, it is not void, although taken contrary to the act. The Bankrupt Act does not avoid a judgment, except as declared and provided in Section 25 of the act. Section 29 declares what conduct of a debtor shall be deemed an act of bankruptcy. It also

imposes a forfeiture of his debt upon the creditor who participates in the act of bankruptcy, and gives the assignee a right of action to recover the money or property paid or transferred contrary to the act by means of an act of bankruptcy. But it does not declare that a judgment, or other act which is to be deemed an act of bankruptcy on the part of the debtor, is also to be held void as a judgment. Sections 35 and 39 must be taken together. The one defines an act of bankruptcy, and the other declares when and under what circumstances acts done or suffered by the debtor shall be void.

So far, then, as the Bankrupt Act is concerned this judgment is valid, because not given within six months before the filing of the petition by the bankrupt. In other words, neither Fuller nor any of his creditors having petitioned to have the debtor adjudged a bankrupt, within six months from the confession of this judgment, it is cured by lapse of time.

This injunction was allowed without argument, and at the time, I had an impression that the judgment was void under the code, because the confession did not sufficiently state the facts out of which the indebtedness arose. There can be no question of the insufficiency of the statement, but upon examination of the subject, I am satisfied that the judgment is not therefore void. In *Milner* v. *Earle*, 24 N. Y., the question was as to the effect to be given to a judgment like this, and the court said:

"As between the parties themselves, however, the judgment confessed should be held legal and valid; that being so, the levy and sale of property under it was good as against the defendant and all the world, except judgment creditors existing and having a lien upon his property."

In *Lee* v. *Fig*, 37 Cal., 336, the same question arose in relation to a judgment confessed in 1851, upon a defective statement by Barton Lee, in favor of Henly & Hastings. Sawyer, J., delivering the opinion of the court, said:

"The judgment is good as between Henly & Hastings and Barton Lee, and was only subject to be attacked for fraud by creditors of Lee, who were defrauded thereby, and that in some

direct proceeding before a sale of the property under it to innocent parties."

It is shown by these authorities that a judgment, though confessed upon a defective statement, is not absolutely void, but only so as to creditors who have a lien upon the property sought to be affected by the judgment. Indeed, in *Lee* v. *Fig*, cited above, the learned judge maintained that even as against lien creditors the insufficiency of statement is only *prima facie* evidence of fraud, and that it was admissible to support the judgment by proof that the transaction was in good faith, and the judgment confessed upon an actual existing debt.

At or before the filing of the petition, it does not appear that any of the creditors of the bankrupt had a lien upon the property affected by this judgment, and therefore they were not then in a condition to question its validity. Nor does it appear that they have since obtained a specific lien thereon by judgment or the like, but I think the act must be construed as giving the creditors who prove their debts, from and after the filing of the petition, such a direct interest in the property or assets of the bankrupt, as to enable them or the assignee for them, to attack such a judgment by suit as fraudulent in law or fact.

The judgment against the bankrupt having, by lapse of time, become valid, so far as the Bankrupt Act is concerned, Smith has acquired a lien thereby upon the real property in question. Upon the application of parties interested, this court has jurisdiction to ascertain and liquidate this lien (Bankrupt Act, Section 1), and while so doing to enjoin Smith from enforcing the same, by execution out of the State court. But after the process of the State court has been executed, and the property sold thereon, it is too late for this court to interfere. The purchaser at such sale acquires a good title, and this is so, even if the judgment was fraudulent, provided the purchaser was an innocent one. For this reason, as well as upon general principles, this court could not set aside the sale upon the process of the State court and order the property resold, however apparent it may be that it was sold much below its real value.

The remedy was in the State court upon objections to the confirmation of the sale.

It is not necessary now to consider whether the assignee may maintain action to recover the proceeds of this property, upon the ground that the judgment was void under the code. This injunction is not ancillary to any suit for that or other purpose, but was allowed under Section 40, to prevent "any person from making any transfer or disposition of the debtor's property" pending the petition to have the debtor adjudged a bankrupt. Here, however, there seems to be at best only a *right of action* in the assignee to recover these proceeds as money had and received to his use. It may also be questioned whether the injunction allowed by Section 40, extends to a case of voluntary bankruptcy.

Objection is also made against this judgment that it is usurious. This objection is predicated upon the stipulation in the judgment, that the accruing interest should bear interest if not paid annually. There can be no doubt but this provision shows that it was intended that this judgment should draw more than the legal rate of interest. But I do not think a judgment or decree can become usurious by any such means. The code provides the rate of interest a judgment shall bear, and the parties cannot change it by stipulations or terms inserted therein. Such stipulations are simply void—as, for instance, that the interest accruing on a judgment shall be paid annually, and if not, shall bear interest as principal. The payment of a judgment confessed for a sum due may be enforced by execution, but if the creditor neglects or forbears to use this remedy, he cannot recover interest on interest accruing in the meantime. Besides, in this case, this stipulation never was attempted to be enforced, as the property was sold on the execution long before the expiration of the first year after the entry of judgment.

As to the money arising from the sale of the six hundred and forty acre tract, on December 24, I think the injunction was improperly allowed, and so far it must be dissolved, and the assignee left to pursue such remedy in the premises, if any, as

he may be advised that he has. As to the twenty-three acre tract, a dissolution of the injunction is not asked for. There can be no doubt but that the court had power to enjoin the attempted sale of this property, but whether there is any sufficient reason for its continuance may be a question. This may depend upon whether the assignee may feel warranted in beginning a suit to set aside the judgment on the ground of fraud. If the judgment should be set aside on that ground, his tract of land would be discharged from the lien and become a part of the general assets of the bankrupt.

As to the fifty dollars and fifty cents made on the execution on December 2, by the sale of personal property, it belongs to the estate of the bankrupt. The judgment gave Smith no lien upon the personal property of his debtor, and the filing of the petition in bankruptcy on December 18, and the subsequent adjudication, avoided the lien of the levy made on November 20, previous.

Stout, for motion.

Fecheimer, contra.

UNITED STATES CIRCUIT COURT—MISSOURI.

1. Under the 35th Section of the Bankrupt Act, it was held erroneous to instruct the jury "that if a sale of property by the bankrupt was not in the ordinary and usual course of business, it was fraudulent." The instruction should have been, not that such a sale was absolutely fraudulent, but that the fact referred to was *prima facie* evidence that it was fraudulent.
2. A sale of property by the bankrupt, out of the usual and ordinary course of business, is presumptively fraudulent, but this presumption may be rebutted by evidence *aliunde* to be produced by the vendee.
3. When it is sought to affect a second vendee with fraud, such fraud must be shown, and the *mere fact*, without more, that he knew that the sale by the bankrupt to the first vendee embraced all the stock of the seller, will not make the purchase of the second vendee fraudulent in law.
4. Certain sections of the Bankrupt Act, relating to fraud, commented on by Dillon, J.

Babbitt, *Assignee*, *v.* Walbrun & Co.

This case is brought here by writ of error from the District Court of the Western District of Missouri. The plaintiff is the assignee in bankruptcy of one Mendelson, and brought this

action in trover against the defendants, Walbrun & Co., to recover the value of a stock of goods which the bankrupt sold to one Summerfield, and the latter to the defendants.

Mendelson is shown by uncontradicted evidence to have been insolvent, and he sold the whole stock of goods to Summerfield (his brother-in-law) at one time, he having written to the latter to come to the place where the former was living, with a view of disposing of his goods to him. Mendelson had little, if any, other property. Summerfield remained there a few days, and, leaving the goods in possession of Mendelson, went to the defendants, living in another place, and with whom he was acquainted, informed them of his purchase of Mendelson, the price he gave, and offered to sell the goods to the defendants at five per cent. profit. One of the defendants went with Summerfield to the place where the goods were, stopped at Mendelson's house, examined the goods, accepted Summerfield's offer, and paid him in cash (as defendants and Summerfield both testify) the purchase-money for the goods, and removed them to the defendants' place of business.

There was evidence tending to show that the defendants, or one of the firm, knew that Summerfield had purchased the entire stock of Mendelson; but there was no direct evidence that the defendants or either of them, knew that Mendelson was in debt, or that he had any fraudulent purpose in disposing of the goods to Summerfield.

There was no evidence that either of the defendants made any inquiry on these subjects.

Both Mendelson and Summerfield testify that the latter paid the former in cash for the goods, but Mendelson never paid any of the money to his creditors, giving as a reason that he had lost it.

This is a mere outline of the case, but sufficient to enable the instructions, which were given to the jury, and which are assigned as error, to be understood.

Among other instructions to the jury, the court gave the following:

First. If, upon considering the facts and circumstances of the case, you come to the conclusion that the sale was not in

Mendelson's ordinary and usual course of business, then the sale was fraudulent; if the sale is found by you to be fraudulent, the next inquiry will be, were the defendants, Walbrun & Co., so connected with the sale throughout, as to make them parties in it, or affect them with notice, that is, such knowledge or relation to it as to make them liable.

The firm of Walbrun & Co. consists of three partners; what any one or more of the partners did, or knew, is the knowledge of the whole of the partners, and they are, so far as this case is concerned, alike responsible.

Second. Returning to the first view presented in regard to Mendelson's insolvency and the reasonable cause which Summerfield must have had of that fact, in order to make the sale void, you are instructed that if either of the partners of Walbrun & Co. had reasonable cause to believe that, at the time of the sale to Summerfield, Mendelson was insolvent, or acting in contemplation of insolvency, and the sale thereof void, yet, if they or either of them afterwards, with that knowledge, purchased or obtained possession of the stock of goods in controversy, and converted them to their own use, they are responsible for the value of the goods.

Third. Upon the second branch of your inquiry as to the *prima facie* fraudulent sale, because not made in the usual course of business, you are instructed that if Walbrun & Co., or either of the partners, knew that the sale was not made in the ordinary and usual course of business, by Mendelson to Summerfield, they are all affected with knowledge of the legal fraud, and if they afterwards, in any manner obtained possession of the goods, and converted them to their own use, they are responsible for their value. The fact that the goods passed through the hands of Summerfield, makes no difference in the liability of Walbrun & Co., provided they were affected with knowledge or notice of the fraud under the instructions given.

The plaintiff recovered, and the defendants prosecute a writ of error.

Allen and *Broadhead*, for the plaintiff in error.

N. Meyers, for the defendants in error.

DILLON, J.—The question is, whether the instructions to the jury, referred to in the statement of the case, are correct; and this involves a construction of the 35th Section of the Bankrupt Act.

The second branch of this section is in these words: "And if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance, is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

It is to be read, however, in connection with the first subdivision of the same section, and with Sections 23 and 30 (latter part) of the same act, these being in *pari materia*.

The court instructed that "if the sale was not in Mendelson's ordinary and usual course of business, then it was fraudulent." The court should have said, not that it was fraudulent, but that such a fact was *prima facie* evidence that it was fraudulent.

The sale by Mendelson to Summerfield would be fraudulent if the following facts concurred:

First. If Mendelson was insolvent or contemplated insolvency or bankruptcy.

Second. If Summerfield, when he bought the goods, had reasonable cause to believe him to be insolvent, and to be acting in contemplation of insolvency.

Third. That the sale was made by Mendelson with a view to prevent, etc., or to defeat, etc., or to evade etc., etc., the provisions of the Bankrupt Act.

Sales so made are void and in fraud of creditors, and their rights under the Bankrupt Law.

And as against the immediate vendue and all actual participators, such sales, if made out of the usual and ordinary course of business (as where an insolvent merchant, as in the case at bar, sells out all his stock and property), is *prima facie* evidence of fraud; that is, of the foregoing elements constituting a fraudulent sale. But it is only *prima facie*, and the presumption may be rebutted by evidence *aliunde* to be pronounced by the vendee.

Now the second instruction, viewed in the light of the above exposition of the meaning of the statute, is erroneous, in that it omits, in speaking of the facts which make Walbrun & Co.'s purchase fraudulent, some of the essential elements of fraud.

This court cannot agree with the learned judge of the District Court, in the views of the law expressed in the third instruction.

It directs the jury that if the defendants knew that the sale by Mendelson to Summerfield was not made in the ordinary and usual course of business, they (the defendants) are affected with the legal fraud, and that if they afterwards obtained the goods in any way and converted them, they are responsible. The error is in holding that such a sale is necessarily fraudulent, instead of presumptively fraudulent.

Besides, when it is proposed to affect a second vendee, such vendee must be shown to have participated in the original fraudulent sale, or it must be shown that he knew, or at least had reasonable cause to know, the facts which made the first sale fraudulent. The *mere fact*, without more, that the second vendee knew that the first sale embraced all the stock of the seller, is not enough to make his purchase fraudulent in law.

The title of the second vendee can only be impeached when it is shown that he participated in the fraudulent sale, or if

this is not shown, then by showing that his purchase was actually *mala fide;* that is, made with knowledge that the sale to the first vendee was fraudulent; and the mere fact that the second vendee knew that the sale to the first vendee was made out of the ordinary course of business, will not alone defeat the title of the second vendee. It is only a circumstance proper as evidence to go to the jury on the question of the *bona fides* of the purchase by the second vendee. The distinction is to be observed between fraud and the evidence which goes to establish fraud. It is proper to observe that the term "fraud," as used in the sentence of the 35th Section under consideration, relates to both classes of cases mentioned therein. The first class is confined to preferences, and the second to sales, etc., other than by way of preference.

Sections 23 and 29 are reconcilable, by confining the latter to actual frauds as contradistinguished from constructive frauds.

Since the views of his honor below are not fully coincident with those above, the judgment of the District Court is reversed, and the case remanded for a new trial.

Judge Treat concurs.

UNITED STATES DISTRICT COURT—WISCONSIN.

Where a creditor has reasonable cause to believe his debtor insolvent, he acquires no preference in bankruptcy over other creditors of the debtor, by taking from his debtor a promissory note with warrant of attorney to confess judgment, and levying an execution issued on said judgment note, on the debtor's stock of goods.

The execution being levied a few days over one month before proceedings in bankruptcy were commenced against the debtors, the limitations of the 35th and 39th Sections of the Bankrupt Act do not apply.

In re Terry & Cleaver.

Miller, J.—John J. Fairbanks, a resident and business man in the city of Milwaukee, at different times between the months of February and September, 1867, loaned to Terry & Cleaver, a firm in the same city, engaged in the book trade,

about five thousand dollars. There were some propositions for a future business connection between these parties, which were not consummated. Under these propositions the money was loaned to the firm. In January or February, 1869, Fairbanks notified Terry & Cleaver that he wanted his money. He was then given to understand that Cleaver would take up the loan by the 1st of July of that year, or make him outside security that would be negotiable. Terry at that time stated to Fairbanks that he was not able to raise the money. The indebtedness was in book-account. It continued in that form until February 23, 1869. Not being satisfied that the loan should continue in that form, Fairbanks insisted on security. Terry & Cleaver informed him that their business would not justify their drawing that amount out. They expressed a wish to give him any security they could. A note with warrant of attorney was given by Terry & Cleaver to Fairbanks for the money on the 23d of February, 1869, payable four months after date. The debtors were frequently urged for the money or part of it, without effect. Until judgment was entered on the note, no part of the money could be collected of the firm in cash. Before the judgment was entered, Fairbanks demanded of Terry & Cleaver a statement of their business, which they refused. Fairbanks testifies that he made every effort to induce an arrangement for the payment of the debt before entering up the judgment. May 9, 1870, judgment was entered on the note and warrant of attorney in the Circuit Court of Milwaukee county, for five thousand four hundred and eighty-four dollars and forty-nine cents, and execution was issued thereon the same day, and Terry & Cleaver's stock of goods levied on. They had no intimation or knowledge in advance of these proceedings. When notified of the execution they exhibited feeling, and intimated Fairbanks might not profit by them, but that he had better taken some other course. Fairbanks gave no publicity of the fact of having the note, except to friends, in a business way; not creditors of Terry & Cleaver. The note was made payable to Fairbanks alone, and not to his order or to bearer, at the request of Terry & Cleaver, as they did not

wish it to be made public or negotiated. Fairbanks told them they need have no fear of anything of the kind, that he should probably take the note home, and put it in his cash drawer, and leave it there until it matured, and of course it would be left there longer unless it was taken up.

Terry testified that when giving the note, he told Fairbanks it was preferring a creditor, and would not give him any security over other creditors. And before the note was given, they told Fairbanks if he pushed them it would break them up. Terry did not mention to any one their having given the note. Terry did not believe the note with warrant of attorney better security than a common note, and they did not intend thereby to give Fairbanks a preference over other creditors. And they told him if the note was a good security they would not give it to him. The money was used by the firm to replenish and increase their stock. The understanding was that Fairbanks should take the note out of the store and keep it. The interest for the year 1869 was not paid.

Proceedings in bankruptcy against Terry & Cleaver were commenced by creditors June 6, 1870. These debtors were adjudicated bankrupts, and an assignee was duly appointed. The marshal having, by virtue of a warrant, taken possession of the stock of goods levied on by the sheriff under the execution in favor of Fairbanks, and sold them, pursuant to an agreement between the two parties, Fairbanks presented his petition, praying an order of court for the payment of the amount of his execution out of the proceeds of sale. To this petition the assignee and petitioning creditors of bankruptcy interpose an answer. They object to the order for payment that said bankrupts, within four months prior to the commencement of bankruptcy proceedings, to wit, on the 9th day of May, 1870, they being bankrupt and insolvent at the time, did suffer their property (their entire stock of goods) to be taken on legal process, to wit, the execution issued on the judgment mentioned in the petition of said Fairbanks, with intent thereby to give a preference to said John J. Fairbanks, a creditor of said bankrupts; and with intent thereby to defeat and delay

the operation of the Bankrupt Act; and that at the time said property was so taken, said Fairbanks had reasonable cause to believe that said Edward Terry and Albert B. Cleaver were insolvent, and that a fraud on the Bankrupt Act was intended; that Fairbanks' judgment was rendered on a note dated February 23, 1869, payable four months after date, with a warrant of attorney to confess judgment thereon, of same date, by said Terry & Cleaver to said Fairbanks; the said Terry & Cleaver being bankrupt and insolvent on said 23d of February, 1869, and so continued until the commencement of proceedings in bankruptcy against them, all of which said Fairbanks well knew; the pretended lien of said Fairbanks referred to in his petition being of no validity or effect, and the same void under the Bankrupt Act.

Fairbanks supplied Terry & Cleaver with money to the amount of five thousand dollars through the summer of 1867, under some understanding between the parties that, upon certain conditions, a copartnership might be entered into between them. The only written evidence of debt consisted of entries in a book, in the nature of charges against Terry & Cleaver as debtors for money loaned, until February 23, 1869, the day on which the judgment-note was given.

The parties, Fairbanks, Terry & Cleaver, resided in Milwaukee, and had very frequent interviews and conversations respecting this note and securing it. There is no doubt, I think, but that Terry & Cleaver were in an insolvent condition in their business at the date of the note. The note was not given for a present consideration, but to secure a pre-existing debt. Fairbanks had notice from Terry & Cleaver when the note was received by him, that, if he pushed them, their business would be broken up, and that they could not take the amount of that debt out of their business. He also had notice that a judgment-note, taken under these circumstances, was not valid as against other creditors. The condition of these creditors did not improve, but grew worse, so that they were not able to pay the interest on the note for the year 1869.

There can be no doubt but that Terry & Cleaver were insolv-

ent, and that Fairbanks had reasonable cause to believe them so at the date of the levy of his execution on the stock of goods.

Terry & Cleaver did not consider that, by the judgment-note, they were giving a preference to Fairbanks, as they believed a judgment and execution would not be available, and as a preference over their other creditors. This does not help the case, for the legal consequence of the note, with warrant to confess judgment, was to be followed by an execution, levy, and sale of their property to the exclusion of the other creditors. These debtors committed an act of bankruptcy by giving the note with warrant of attorney to confess judgment, and also by suffering their property to be taken in execution to satisfy said judgment. By Section 39 of the Bankrupt Act, it is an act of bankruptcy in an insolvent debtor to give a warrant to confess judgment, or to suffer his property to be taken on legal process. Either of these acts is sufficient to enable his creditors to proceed against him in bankruptcy by petition, provided such petition is brought within six months after the act of bankruptcy shall have been committed. One act of bankruptcy charged in the petition of creditors against Terry & Cleaver, is the suffering their stock of goods to be taken on the execution of Fairbanks, on the 9th day of May, 1870, which was about a month before the petition in bankruptcy was brought. The limitation of six months did not apply. But if the giving the note with warrant of attorney to confess judgment had been the only act of bankruptcy alleged in the petition against Terry & Cleaver, the limitation of six months would have barred the proceedings in bankruptcy.

It is contended that the statute limitation should also be applied to the claim of Fairbanks, as the note with warrant of attorney was given more than six months prior to the petition in bankruptcy.

The cause of bankruptcy alleged in the petition against Terry & Cleaver, is, that they suffered their stock of goods to be taken on execution in favor of Fairbanks. His claims of preference must rest on his execution and levy. The note with warrant

of attorney was merely evidence of a debt, and first became an available security by virtue of the levy under the execution.

The note with warrant of attorney to confess judgment, was given Fairbanks in February, 1869, pursuant to his frequent importunities for security. Instead of having judgment entered and execution issued and levied on the goods of his debtors, who were not even paying the interest for the year 1868, he locked up the papers in his money drawer, where he retained them until the 9th of May, 1870. In all that time he had frequent opportunities of inquiring into the financial condition of his debtors. And in the course of that time the firm of Terry & Cleaver contracted debts to a large amount for borrowed money and for goods purchased on credit. It does not appear that these creditors had any knowledge of the existence of the judgment-note before the service of the execution. If Fairbanks were permitted, after concealing the evidence of his intended preference over other creditors, to their prejudice, for that length of time, to obtain, by means of the execution, payment in full, the great object of the Bankrupt Act, equality among creditors, would be frustrated. There can be no doubt but he had reasonable cause to believe Terry & Cleaver to be insolvent before and at the time he entered up judgment and issued execution.

For these reasons I am constrained to deny the prayer of the petition.

SUPERIOR COURT—NEW YORK.

When judgment was obtained against J. F. for one thousand and ninety-eight dollars and seventy-six cents, damages and costs in the Supreme Court, on the 4th of April, 1867, and said J. F. intended to appeal therefrom to the General Term of the Supreme Court. An affidavit set forth that said judgment was recovered upon a promissory note, dated January 25th, 1867, for one thousand and fifty-three dollars and fifty-four cents, given by J. F. to plaintiffs herein, who became the assignees about the 11th of May, 1868, said judgment passing to said plaintiffs as assignees. On the 30th of May, 1868, J. F. filed his petition in bankruptcy, and an order was procured requiring plaintiffs to show cause, etc., and staying all proceedings on the part of plaintiffs. The motion was heard in Special Term, Superior Court, January 19th, 1869.

Held, motion denied without costs to either party, but all proceedings on any

judgment that may be obtained against defendant, to be stayed until the further order of the court.

HOYT *et al. v.* FREEL *et al.*

THIS action is brought upon an undertaking executed by the defendants, wherein they recited that on the 4th of April, 1867, in the Supreme Court of the State of New York, George A. Wicks, Albert Cheesbro, Jr., Joseph T. Tow, Charles Warner, Henry A. Coburn, and Frank E. Wetherell, recovered a judgment against James Freel for one thousand and ninety-eight dollars and seventy-six cents damages and costs, and that said James Freel, feeling aggrieved thereby, intended to appeal therefrom to the General Term of the Supreme Court, and whereby they undertook, pursuant to the statute in such case made and provided, that said James Freel would pay all costs and damages which might be ordered against him on said appeal, not exceeding five hundred dollars; and, also, that if said judgment, so appealed from, or any part thereof, should be affirmed, or the appeal should be dismissed, the said James Freel would pay the amount directed to be paid by said judgment, or the part of such amount as to which the said judgment should be affirmed, if it be affirmed in part only, and all damages and costs which should be awarded against said James Freel on said appeal.

On an affidavit setting forth, among other things, that the judgment in said undertaking mentioned was recovered upon a promissory note, dated January 25, 1870, for one thousand and fifty-three dollars and fifty-four cents, given by said James Freel, for goods sold and delivered to him by the firm of George A. Wicks & Co. (composed of the plaintiffs in said judgment), of whom the plaintiffs herein became the assignees about the 11th of May, 1868; that said judgment, and the debt whereon the same is founded, passed to the plaintiffs herein as assignees; that on the 30th of May, 1868, said James Freel filed his petition in bankruptcy, and was thereupon duly adjudicated a bankrupt; that the plaintiffs, as such said assignees, duly proved their debt and claim on said note against said James Freel as a bankrupt; but no mention is made in the proofs thereof (as

appears from a copy of the proofs annexed to the affidavit), of the same being in any manner secured; and that there has been no unnecessary delay on the part of said James Freel to obtain his discharge, an order was procured, on behalf of all the defendants herein, requiring the plaintiffs to show cause why all proceedings herein, on part of said plaintiffs, until the question or matter of the discharge of said James Freel, as a bankrupt, shall have been determined, or until the further order of the court; and, in the meantime, staying all proceedings on the part of plaintiffs.

The motion now comes on to be heard, and is founded on the summons and complaint herein, and on said affidavit and order to show cause.

S. H. Stuart, for the motion.

Clark, opposed.

JONES, J.—The questions on this motion are twofold.

I. As regards the bankrupt himself. II. As regards the other two defendants.

I. As regards the bankrupt himself:

Section 21 of the Bankrupt Law of March 2d, 1867, provides: "That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed discharged and surrendered thereby; and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt, in endeavoring to obtain his discharge. And, provided also, that if the amount due the creditor is in dispute, the suit, by leave of the Court in

Bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid."

Considering this section by itself, the third clause appears at the first blush to apply to both the preceding ones. But on a closer analysis this is seen not to be the case. The provisions of the third clause are wholly inconsistent with those of the first, as the same are there expressed. The third clause provides for a temporary stay until the question as to whether the bankrupt shall have a discharge or not is determined, while the language used in the first, taken by itself, makes the bare act of proving a claim an absolute surrender forever of all rights of action therefor, and of all suits at law or in equity thereon, and of all proceedings commenced, but not terminated, and of all judgments thereon, irrespective of the result of the application for a discharge.

From this it is evident that the provision for a mere temporary stay has no application, and could not have been intended to apply to that which was absolutely extinguished forever.

In this view, the third clause not applying to or operating on the first, neither the Court of Bankruptcy nor any court, except that in which the suit or proceeding might be pending or the judgment rendered, or a Court of Equity acting on a bill filed, could stay proceedings in cases falling within the 1st Section. The court in which the suit or proceeding is pending or the judgment rendered, or a Court of Equity on bill filed, would have power by a perpetual stay or injunction to enforce the voluntary surrender made by a creditor by the act of proving his claim; and it would be the duty of said court, on proper application, so to enforce it.

Such would be the power and duty of the court on this motion, if the first clause of the section operates, as its language imports, as an absolute extinguishment forever of the cause of action and of this suit.

There are, however, other provisions of the Bankrupt Act in connection with which the first clause of this section is to be construed, and which materially limits the effect of its general

language. The words, then, of the first clause are to be read, and the three clauses construed, in reference to this limited meaning. Let us, then, inquire how far this limitation extends, and what effect it has on the construction of the three clauses.

The Bankrupt Act of 1841 contained a clause substantially the same as the first clause in question. The effect and meaning of that clause in the Act of 1841 came under the consideration of the late Court of Chancery, in the case of *Haxtun* v. *Corse*. In that case the Vice-Chancellor held that under the provisions in question, a creditor who proved his debt thereby surrendered his right of action, and was barred from maintaining any suit at law or in equity for his debt, and from enforcing any judgment he might have recovered therefor; and that he could only obtain or claim payment of his debt under and by virtue of the proceedings in bankruptcy.

As, under the bankrupt proceedings, the only property that could thereunder be subjected to the payment of the bankrupt's debts, was that which he had at the time of his assignment, it followed from this doctrine that so far as previous creditors were concerned, it was wholly immaterial to the bankrupt whether he obtained a discharge or not, for in either event his future acquisitions were protected, and from this it followed that there was no motive for a proving creditor to exercise the right given him by the statute of opposing the discharge, because a successful opposition would be of no benefit to him, as he would not thereby acquire any greater right than he had before, nor subject to the payment of his claim, any property other than that already subjected thereto; on the contrary, a successful opposition would be prejudicial to him, as subjecting the assigned property to liens acquired thereon by non-proving creditors prior to commencement of the bankruptcy proceedings, by means of judgments and bills in chancery.

This result was seen by Chancellor Walworth when the case of *Haxtun* v. *Corse* came before him on appeal (2 Barb. Chy., 508); he consequently disapproved of the doctrine of the Vice-Chancellor; and construing the clause in question in connection with other provisions of the act of 1841 (which other provis-

ions are substantially contained in the present act), held that the bare fact of a creditor proving his claim did not, by operation of this clause, extinguish his right of action for the recovery and collection of his claim, but merely operated as a waiver of his right to institute any suit or proceedings at law or in equity which were any way inconsistent with his election to obtain satisfaction of his debt under the bankrupt proceedings.

The learned Chancellor well remarks that this is the reasonable construction of the clause, and the only one by which the evident intent of Congress, as gathered from a view of the whole statute, could be carried out; since, by it, while the proving creditor is prevented (whether a discharge be granted or refused) from subjecting the already-acquired property of the bankrupt to the satisfaction of his debt otherwise than through the bankruptcy proceedings, yet in the event of his successfully opposing the bankrupt's discharge, he remained at liberty to enforce the collection of his claim out of after-acquired property by suit or action in equity or law. Thus it would become material to the bankrupt to obtain his discharge; and a motive is furnished the proving creditor to oppose the discharge; for, if a valid discharge be granted, it would afford a complete protection to all after-acquired property.

From this construction, it is evident that there are some suits and proceedings by a previous creditor which, by the bare act of the proving of the debt, irrespective of the determination of the question as to whether the bankrupt shall have his discharge, are surrendered and given up, *e. g.*, those the whole object and purpose of which is to operate on already-acquired property, and that alone; while there are other suits and proceedings which are not affected by any express provision of the act other than that relating to the effect of a discharge when obtained, unless the clause in Section 21, relating to a stay of proceedings, is applicable to them; of this class of proceedings are ordinary actions at law for the recovery of a contract debt, and judgments rendered in such actions. For, although any lien obtained by reason of such judgments, is surrendered and

given up by the act of proving the debt, yet the same reasoning which leads to the conclusion that the right of action is not extinguished by that act, also leads to the conclusion that such suits and judgments, so far as they may affect and fasten on after-acquired property in case a discharge is not granted, are not surrendered.

I am aware that in *Haxtun* v. *Corse* the Chancellor dismissed the bill on the ground that its maintenance would be in violation of the clause in question, contained in the Bankrupt Act of 1841; but in that case the bill was filed to reach and subject to the payment of judgments rendered at law the already-acquired property of the defendant.

The dismissal was in perfect accord with the foregoing reasoning.

It is true the learned Chancellor uses the following language: "The statute does not merely suspend suits in the situation in which they are at the time the creditors come in and prove their debts, but all proceedings which have been commenced before that time are absolutely relinquished, surrendered, and discontinued, by the mere act of proving the debt for the recovery of which such proceedings were instituted." But I submit that this language was used in reference to suits and proceedings of the nature of the one then pending before him. Its application to suits and judgments other than those which had for their sole end the subjection to the payment of the claim, or the enforcement of a lien on already-acquired property, would be antagonistic to the previous reasoning of the learned judge. The statute was just as strong against the creditor retaining any right of action whatever for the debt, as against his maintaining any suit therefor. He, the learned judge, well held that the right of action was not extinguished by the act of proving the debt, but that the proving creditor was only barred from instituting suits or proceedings inconsistent with his election to obtain satisfaction of his debt under the bankruptcy proceedings; and that it was not inconsistent with such election for him, in case a discharge was refused, to reach after-acquired property by action or suits at law or in equity.

The bare retention of a judgment, recovered prior to the filing of the bankrupt's petition, and the pendency of an action commenced prior to that time, are not inconsistent with such election until a valid discharge has been obtained. They do not, in any way, interfere with the bankruptcy proceedings. A surrender of them, prior to said discharge, does not aid, or remove any obstacle to the conduct and effect of the bankruptcy proceeding under the provisions of the act.

It would, on the other hand, needlessly harass and prejudice the creditor in the event of a valid discharge not being granted; for then, to obtain his rights, he would have to institute a new action, and go through a more or less tedious and expensive litigation to arrive at the same point at which he was when the petition was filed, involving a total loss of the expenses previously incurred, and also subjecting him to the objections, that, his right of action being merged in the former judgment, which has been surrendered, he has no standing in court, and that the statute of limitations has run.

To require such surrender, then, is not only objectless, as nothing is to be thereby gained by the bankrupt or his other creditors, but may be highly prejudicial to the creditor who holds such judgment, or who has commenced such an action.

I am satisfied, therefore, that if the facts in the case of *Haxtun* v. *Corse* had indicated to the learned Chancellor that there were judgments and actions the object whereof was not solely to affect already-acquired property, he would have drawn the above distinction, and modified his general language so as to express it.

Although, then, the general language of the first clause of the section in question, taken by itself, would call for an absolute surrender forever, yet the other provisions of the act show that this general language is to be considered as used in reference to the subject-matter of this legislation only, and as only calling for such surrender as is requisite to carry out the objects and end contemplated by the act.

Expressing in words the implied limitations thus imposed on the general language used in the first clause by the other pro-

visions of the act, it will read thus: No creditor proving his debt or claim shall be allowed to subject to the payment of his debt or claim the property belonging to the bankrupt at the time of filing his petition, by any suit at law or in equity against the bankrupt, but shall be deemed to have waived all right of action or suit against such property of the bankrupt; and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed discharged and surrendered thereby, so far as they shall affect such said property of the bankrupt.

Under this construction, there are suits, actions, and proceedings, by proving creditors, and also judgments held by them of a nature above indicated, which are not surrendered and given up by the act of proving the debt or claim. To this class of actions, proceedings, and judgments, the third clause might perhaps be held to extend, notwithstanding the objection that, as the language of that clause, if it applies at all, extends to all suits, etc., embraced in the first clause, it cannot be regarded as being intended to apply to only part.

It is not worth while to discuss this point; for this class of action, etc., comes within the second clause, to which the third clause is clearly applicable; they are suits at law or in equity by a creditor whose debt is provable under the act; the fact that he has proved his debt does not change its provable character.

Under, then, the operation of the second and third clauses, this motion, so far as the bankrupt is concerned, must be granted, unless some clause of the act, not yet adverted to, restrains such operation.

The 33d Section contains the following clause: "No discharge granted under this act shall release, discharge, or *affect* any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise."

It is a well-established principle of law, that in cases of partners and joint contractors, an action must be brought against all the partners and all the joint contractors, and must

proceed against them all, and the judgment to be rendered must be a joint judgment against all, unless one or more of them shall have died, or have been discharged from the obligation of the contract or indebtedness by operation of law, not attributable to the voluntary act or omission of the creditor.

If, then, the stay provided for by the 21st Section affects this class of actions, the result would be that one defendant by filing a petition in bankruptcy would stay proceedings against all the others, and thus not only subject the creditor to delay in the collection of his claims against the others, for a period more or less long, in some instances perhaps to one or two years, but also expose him to the danger of loss of his claim from the fluctuations in the fortunes of those others.

This would give to the mere filing of the petition a greater effect than the discharge, which is the end to be obtained by the petition, has.

There is, therefore, an inconsistency between the two clauses, and the question arises which is to yield to the others.

Of the two, that one must yield, the non-enforcement of the provisions whereof to their full extent will least interfere with the part it is designed to take in carrying out the objects and purposes of the act taken as an entirety.

One of the objects and purposes of the act was not to interfere with or impair the right of creditors against copartners, or cojoint contractors, with the bankrupt. The object is to be carried out through the above cited clause in Section 33.

A non-enforcement of this section to its full extent, caused by a stay granted under Section 21, would materially interfere with the object to be attained thereby, and there would be no means by which that object could be attained.

There are other objects and purposes of the act, viz.:

First. That the already-acquired property of the bankrupt shall not be subjected to the payment of his debts, by means of a judgment recovered after the filing of the petition, or of proceedings had on such judgment.

Second. That the bankrupt shall not be needlessly subjected to actions and suits.

Third. And, perhaps, to enable the bankrupt to claim protection as against such actions and suits, through his discharge, if he obtains it.

These are the only purposes and objects which the clause for a stay in Section 21 can, by any possibility, be supposed designed to carry out.

It is not necessary to give effect to this clause for a stay, to its full extent, to carry out these purposes.

Let us take them in the inverse order.

A bankrupt can obtain the full protection of his discharge after as well as before judgment, on application to the court in which the action is pending. Indeed, in case of judgment rendered prior to the filing of the petition, the bankrupt's only remedy, in every case, is by such application to the court which rendered the judgment, or a court of equity.

The commencement and prosecution of an action against a bankrupt, together with his copartners or cojoint contractors, and the rendering of a joint judgment therein, is not needless, but absolutely necessary. It is not, therefore, requisite to apply the clause for a stay to such cases in order to carry out the second object.

Section 14 enacts that the assignments to be made thereunder shall relate back to the commencement of the proceedings in bankruptcy; consequently, no judgment rendered on a provable debt, nor any proceedings had thereon, can create a lien, or subject to the payment of the debt any already-acquired property of the bankrupt. The stay, therefore, is unnecessary for this purpose.

It may be suggested that the object of the clause was to prevent a conflict of jurisdiction which might arise if the creditors were allowed to proceed to judgment. This cannot be. All courts in the United States are bound to carry into effect the constitutional acts of Congress according to their true intent and meaning, and it cannot be answered that Congress was unaware of this, or, being aware of it, legislated on the hypothesis that the courts would not perform their duty. The court in which a judgment is rendered has full power to give

proceed against provisions of the act respecting the application of must be a required property of the bankrupt to the payment of them shall claims, by staying all proceedings to make the judgtion of a lien on, or to collect it out of such property, and there attri be no question but that, when called on, it will exercise such power.

It is clear that the non-enforcement of the clause for a stay to such an extent as to interfere with the clause in the 33d Section will interfere less with the part it is designed to take, than the non-enforcement of the clause in the 33d Section will interfere with its part; the clause for a stay, therefore, must yield.

The various conclusions arrived at seem to me to be just to the creditor as well as to the bankrupt, and not to interfere, in any respect, with the attainment of the objects sought by the Bankrupt Act.

The stay as asked for must be denied, as far as the bankrupt is concerned, but all proceedings on any judgment that may be obtained against him must be stayed until the further order of the court.

II. With respect to the two other defendants.

The Bankrupt Act does not in terms enact that the adjudging one a bankrupt, or the giving him a discharge, or the proving the debt against him, shall discharge his cojoint debtors or his sureties from the debt, or prevent the creditors from pursuing and recovering from them. Nor is there any provision that the claim of the proving creditors against joint debtors with, or sureties for the bankrupt, shall be assigned or given up by the creditors to the assignees. Indeed, such provisions would be manifestly absurd. The claim of the creditor against the surety of the bankrupt is, in no sense, the property of the bankrupt. The bankrupt has no right or interest in it, consequently can transfer none to his assignee; he could not enforce the claim himself, nor can his assignee, claiming through him. If the creditor enforces his claim, and collects it from the surety, the property of the bankrupt is not impaired thereby; the same amount of property that was before distributable remains still distributable; and the enforcement of the claim

against the surety does not increase the amount of the bankrupt's indebtedness. A provision that should compel a proving creditor to assign his claim against a surety for the bankrupt to the assignee in bankruptcy, and permit such assignee to sue and recover against the surety, would lead to these startling results.

First. It would separate the mere security from the principal debt.

Second. It would compel the surety to part with his property to his principal, to whom he owes no duty and is not indebted for the purpose of that property, applied, contrary to his contract, to the payment of all debts of the bankrupt.

The same remarks, as well as other more forcible ones, are applicable to joint debtors.

The case of *Haxtun* v. *Corse* (4 Edw. Ch. Rep., 588, and on appeal in 2 Barb. Ch., 531, 532), cited by defendant's counsel, does not contain any such startling proposition.

They simply hold, that under Sections 3 and 5 of the Act of 1841, which contained substantially the same provisions as Sections 14 and 21 of the present act, the bankrupt's rights of property passed to the assignee, and that any lien obtained by a proving creditor by a judgment or bill filed in equity on the rights of property of the bankrupt were divested by the act of proving the claim.

The English case in 4 Younge & Collyer—also refers to property of the bankrupt, and is founded on provisions in the English act which are not contained in ours.

I am not, therefore, called upon by any of the provisions of the Bankrupt Act, to grant this motion as to these two defendants.

Indeed, the act itself provides, "No discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint creditor, indorser, surety, or otherwise."

The filing of a petition, which is merely the act of setting on foot a proceeding to attain, as its end, a discharge, cannot have a greater effect than the discharge itself.

Motion as to these two defendants denied.

Motion denied without costs to either party; but all proceedings on any judgment that may be obtained against defendant, James Freel, to be stayed until the further order of the court.

UNITED STATES DISTRICT COURT—NEVADA.

Where the Board of Trustees of a company authorized their secretary to file petition for the purpose of having the corporation adjudicated bankrupt, *Held*, that such filing was illegal, the trustees having no power to authorize their secretary to do so. When a corporation seeks to avail itself of the provisions of the Bankrupt Act, it must do so in the manner prescribed by the act. Adjudication vacated.

In re "THE LADY BRYAN MINING CO."

ON motion of a creditor having a lien by attachment to vacate the order adjudging the said company bankrupt.

The facts are as follows:

The Lady Bryan Mining Company is a corporation organized under the laws of Nevada, and carrying on the business of mining in Storey county.

On the 15th of August last, its Board of Trustees, at a meeting thereof, authorized George W. Hopkins, the Secretary of the company, to file a petition for the purpose of having the said corporation adjudged a bankrupt.

The petition was filed pursuant to such authority, on the 17th day of August.

On the 29th of August the Board of Trustees made a By-law (there being none on the subject), prescribing the manner of giving notice of a meeting of stock-holders, and providing that such notice should be given not less than fifteen days before the meeting.

A notice of stockholders' meeting was published for two days in the *Daily Enterprise*, August 29th and 30th, calling a meeting at Virginia City, Nevada, on the 31st of that month.

Some of the stockholders reside in San Francisco.

The object and purpose of the meeting was stated in the notice to be the ratification of the action of the secretary in filing the petition.

In re "The Lady Bryan Mining Co."

A meeting of the stockholders was held on the 31st of August, at which four stockholders, representing thirteen thousand three hundred and eighty-nine shares, were present.

The total number of shares into which the capital stock is divided is eighteen thousand, of which the company itself owns about seven hundred.

As appears from the books of the company, the stock is held by about thirty persons.

At this meeting of stockholders a resolution was unanimously passed ratifying the action of the secretary in filing the petition, and of the Register adjudging the company a bankrupt.

Ely Johnson, the moving party, is a creditor having a lien by attachment upon the property of the corporation.

The order to show cause was made on the 29th day of August. No objection was made to the proceedings by motion in the matter.

Upon these facts the court held:

First. That the Board of Trustees had no power to authorize the secretary to file the petition, and that such filing on the 17th day of August was illegal.

Second. That the only fair and reasonable construction of the words "majority of the corporators," in the 37th Section of the Bankrupt Act, is to so interpret them as that the holders of a majority of the shares of the capital stock may authorize the filing of a petition under that section.

Third. That when a corporation seeks to avail itself of the provisions of the Bankrupt Act, it can do so only in the mode prescribed by the act, and that the petition in bankruptcy can only be filed by authority of the corporators holding a majority of the shares of stock, given at a legal meeting called for that express purpose.

Fourth. That where, as in this case, the commencement of proceedings was unauthorized and void, no subsequent ratification by the corporators can make the proceedings valid.

And an order was made vacating the adjudication.

UNITED STATES DISTRICT COURT—W. D. MICHIGAN.

Where bankrupts (involuntary) complied with all the requirements of the Bankrupt Law, filed a petition for their discharge, there being funds in the hands of the assignee, and the final dividend not having been declared, the following question arose: "Whether the costs incurred upon the petitions of bankrupts for their discharge, the hearing on said petition, publication of notice of hearing, etc., shall be paid out of the funds in the assignee's hands belonging to the estate of said bankrupt, or by the bankrupts themselves?"

Held, the assignee, when he has funds, should pay the costs.

In re M. Olds, W. Olds, and L. Olds. *Involuntary.*

At Kalamazoo, in said district, on the 31st day of August, A. D. 1870. Before J. Davidson Burns, Register in Bankruptcy.

I, the above-named Register, do hereby certify that, in the course of the proceedings in said cause before me, the said bankrupts have filed a petition for their discharge; a hearing has been had thereon, no opposition has been made by any creditor to the granting of discharge; two of the bankrupts have taken the oath required by Section 29 of the Bankrupt Act, and I have made certificate of conformity, and report in favor of their discharge.

This is an involuntary case, and there are funds in the hands of the assignee, the final dividend not having been declared.

The following question pertinent to the proceedings has arisen, and I have been requested to certify the same to the District Judge, for his opinion thereon, to wit: "Whether the costs incurred upon petition of bankrupts for their discharge, the hearing on said petition, publication of notice of hearing, etc., shall be paid by the assignee out of funds in his hands belonging to the estate of said bankrupts, or by the bankrupts themselves."

In my opinion the assignee, when he has funds, should pay such costs.

The bankrupts having, by force of law, surrendered all their property to be disposed of for the benefit of their creditors, it seems just and right that the avails of such property shall, so

far as necessary, be used to give the bankrupts that relief which, upon conformity to the requirements of the law, they are entitled to claim, viz., a discharge from their debts.

The case would be different if creditors successfully opposed the granting of a discharge, but when no opposition is made, and the bankrupts in all things conform to their duty under the act, they should not be deprived of the discharge which (unless the costs thereof shall be paid by the assignee out of the estate funds) they may not have the pecuniary ability to obtain.

Section 28 of the Bankrupt Act provides that in the order for a dividend, the following claims shall be entitled to priority and to be first paid in full: first, the fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act.

The proceedings on petition for discharge are certainly "proceedings in bankruptcy."

WITHEY, J.—The decision of the Register, J. Davidson Burns, Esq., certified above, is approved.

UNITED STATES CIRCUIT COURT—MICHIGAN.

Where a petition was filed, and an injunction allowed against C. E. B., a son of the bankrupt, to restrain the sale of certain real estate, etc., and C. E. B. moves to dissolve the injunction on affidavit of himself and the bankrupt, denying the collusion and connivance charged in the petition,

***Held*, 1. A secured debt is provable within the meaning of Section 39 of the Bankrupt Act.**

2. That a creditor who has a lien upon the property of his debtors by virtue of a judgment, etc., filing a petition for adjudication of bankruptcy without reference to such lien, thereby waives and relinquishes the same, and stands before the court as an unsecured creditor.

3. Allegations upon information, and being merely supported by other proof, are not sufficient to sustain an injunction.

***Held*, C. E B. had probable cause to believe that J. B. B., the alleged bankrupt, was insolvent, and that he suffered the said C. E. B. to obtain judgment, execution, and levy, with intent to give him a preference in violation of the Bankrupt Act, and that therefore the injunction issued in this case ought to be retained and continued till the further order of the court. Motion to dissolve denied.**

In re BLOSS.

ON filing the petition of adjudication of bankruptcy, a

petition was filed and an injunction was allowed against one Charles E. Bloss, a son of the alleged bankrupt, to restrain the sale of certain real estate upon an execution in favor of the said Charles E., and against the said alleged bankrupt, issued from the Circuit Court for Wayne county, for the reason, as alleged in said petition, that the judgment upon which the execution issued was obtained by collusion and connivance with the said alleged bankrupt, and for the purpose of preventing the petitioning creditor from collecting his claim.

Charles E. Bloss now moves to dissolve the injunction, which motion is founded on affidavit of himself and the said alleged bankrupt, denying the collusion and connivance, and the fraudulent purpose charged in the petition. On the hearing of the motion, counsel for the petitioning creditors offered counter affidavits, which were objected to, but the affidavits were received subject to the objection.

It appears, from the affidavits, that the claim of the petitioning creditor was also in judgment in the Wayne Circuit Court, and that he had garnished a claim of the alleged bankrupt against the Detroit and Milwaukee Railway Company, and had also levied an execution upon the same real estate, but subsequent to the levy in favor of the said Charles E. Bloss. It is contended, as an additional ground for dissolving the injunction, that the claim of the petitioning creditor being a second claim, it was not provable under the Bankrupt Law, and therefore he could not file the petition for adjudication of bankruptcy.

Mr. Dickinson and *Mr. Russell*, for the motion to dissolve.

Messrs. Wilkison and *Post*, for petitioning creditors, contra.

LONGYEAR, J.—*First.* As to receiving counter-affidavits on a motion to dissolve an injunction, the authorities are by no means uniform. In bankruptcy cases, where there are generally interests of creditors involved other than those immediately before the court, there are strong reasons for adopting the more liberal rule, and allowing counter-affidavits to be read, so that the court may be possessed of all facts bearing upon the ques-

tion, and thereby enabled to protect the interests of all parties concerned. The objection to receiving the counter-affidavits is therefore overruled.

Second. By Section 39 of the Bankrupt Act, a petitioning creditor for adjudication of bankruptcy, must be one whose debt is provable under the act. By Section 20 it is clearly contemplated that a secured creditor may prove his debt. It is true he cannot be admitted as a creditor only for the balance of his debt after deducting the value of the property upon which he has a lien, unless he releases or conveys his security to the assignee, in which case he may be admitted as a creditor for his whole debt; yet his debt is nevertheless provable within the meaning of the act, before such balance is ascertained or such release or conveyance is made. It does not follow that because he cannot be admitted as a creditor, he therefore cannot prove his debt. On the contrary, the proving of his debt is a necessary preliminary step to his eventually being admitted as a creditor. (See *Davis* v. *Carpenter*, 2 N. B. R., 391; *in re* Ruehle, 2 N. B. R., 577; *in re* Winn, 1 N. B. R., 496; *in re* Bigelow, 1 N. B. R., 632.) It is said, however, that the conditions upon which a second creditor can be admitted as a creditor, depends upon an assignee being first appointed, through whom those conditions can be complied with (Section 20); and therefore he cannot vote for assignee at the first meeting of creditors. This is, no doubt, correct; but it does not follow that the proceedings must therefore fail; because, 1st, there may be other creditors who can vote; and, 2d, if there are none, then a condition of things exists which is provided for by Section 13 of the act, in which the Judge, or, if there be no opposing interest, the Register, is required to appoint an assignee. (*In re* Cogswell, 1 N. B. R., 62; Anon., 1 N. B. R., 122.)

I have thus far considered this question as though the debt was set up in the petition as a secured debt. But such is not the case. The petition for adjudication of bankruptcy, and the proof of claim accompanying it, is without reference to any lien or security whatever; and it has been held, I think correctly, that where a creditor proves his full claim without ref-

erence to his lien or security, and without apprising the Bankrupt Court of its existence, such an act is a waiver of the lien and relinquishment of the security, and such creditor will be ordered to release the same to the assignee. (*Stewart* v. *Isador*, 1 N. B. R., 485, and the numerous cases, English and American, there cited.) The lien or security in this case was by judgment and execution, and it is expressly provided by Section 21 of the act that all unsatisfied judgments which may have been previously obtained upon one debt proven in the bankruptcy proceedings shall be deemed to be discharged and surrendered. It is true these decisions and Section 21 have reference to debts proven in the course of the proceedings after they have been commenced, but they certainly apply with as great, if not with greater force, to a creditor proving his claim for the purpose of commencing proceedings.

I hold, therefore, upon this point: *First.* That a secured debt is provable within the meaning of Section 39 of the Bankrupt Act, so as to entitle a creditor holding such debt to file a petition for adjudication of bankruptcy under said section.

Second. That a creditor who has a lien upon the property of his debtors, by virtue of a judgment, execution, and levy, or as secured by garnishment, filing a petition for adjudication of bankruptcy without reference to such lien or security, thereby waives and relinquishes the same, and stands before the court as an unsecured creditor.

Third. The grounds for injunction are alleged in the petition on information and belief merely, and the petition was not accompanied by affidavits sustaining the allegations. Neither, in my opinion, do the affidavits and counter-affidavits read on the hearing of the motion to dissolve, sustain those allegations. If this was all, the court would not hesitate to dissolve the injunction, because allegations upon information and belief merely, unsupported by other proof, are not sufficient to sustain an injunction.

But it is contended that the affidavits read at the hearing of the motion to dissolve do show that at the time said Charles E.

Bloss obtained his judgment and procured a levy of execution on the property of the said Joseph B. Bloss, he, the said Joseph B., was insolvent, and that he suffered such levy to be made with intent to give a preference to the said Charles E., and that the said Charles E. had reasonable cause to believe that the said Joseph B. was so insolvent, and that such was his intent, and that therefore the court will continue the injunction, allowing the petition to be amended, if necessary, so as to cover that ground. Such I believe to be the correct practice. Allowing that the facts appearing are such that if properly alleged they would warrant an injunction, there certainly would be nothing gained by dissolving the injunction and then re-issuing the same state of facts. It becomes important, then, to inquire into the facts as bearing upon this phase of the question.

That Joseph B. Bloss was insolvent there can be, and I believe is, no controversy. That Charles E. Bloss knew that he was so insolvent is equally clear. This appears from declarations made by him to the attorneys of the petitioning creditor during the negotiations for compromise; and all the facts go to show that Charles E. was perfectly familiar with the pecuniary circumstances of Joseph B., whatever they were.

It is sufficient under the 39th Section of the act that the alleged bankrupt suffered his property to be taken on the execution. It cannot be said that he had no alternative, because he had the alternative to put himself into bankruptcy, and thus prevent the levy. Did he then suffer the levy to be made with intent to give a preference to Charles E.? It is said that he could not have entertained such intent, for the reason that the petitioning creditor was fully secured by his garnishment of the claim of Joseph B. against the Detroit & Milwaukee Railway Company, and that it does not appear that there were other creditors. But was this petitioning creditor so sued? It is true Joseph B. claims two thousand dollars of the company, but the company disputes his claim, and it was then, and still is, in litigation; and the evidence is clear, to my mind, that neither Charles E. nor Joseph B. expects a recovery any-

thing like the amount claimed, or sufficient to liquidate more than a small part of the petitioning creditor's claim. But it is said the petitioning creditor slept upon his rights, otherwise he might himself have levied upon the property afterwards levied on by Charles E. This is fully explained by the pending negotiations for compromise conducted by Charles E. on behalf of Joseph B., and the representations made by Charles E. to the attorneys of the petitioning creditor as to the worthlessness of the property over and above the incumbrances which were upon it.

The effect, then, of the levy in favor of Charles E. was to give him a preference, and as every person is presumed to intend the necessary consequences of his own acts, Joseph B. must be presumed to have suffered his property to be so taken with intent to give a preference to Charles E.

We have already seen that Charles E. knew that Joseph B. was insolvent. Had Charles E. reasonable cause to believe that Joseph B. suffered him to obtain his levy with intent to give him a preference? The answer is clear and potent. Charles E. knew Joseph B.'s condition as well as he knew it himself. He was also perfectly familiar with the condition and prospects of the claim of Joseph B. against the railway company, and of course knew that the petitioning creditor was very inadequately secured thereby. It is simply preposterous to say that he had not reasonable cause to believe that Joseph B. suffered him to obtain his levy with intent to give him a preference. Why did Charles E. thus suddenly turn round and prosecute his father for monies he had, like a dutiful son, loaned him for his support and otherwise, and push his suit to judgment, execution, and levy with such expedition, if it was not to gain an advantage over the other creditors of Joseph B.? He had no difficulty with his father, but was evidently in perfect accord with him. So far as his father was concerned, it does not appear but he was willing to continue to wait for his pay. But it would not answer to let other creditors in to share the property of Joseph B. Charles E.'s claim may be the more meritorious, and no moral turpitude may be attributable to

him for the course he has pursued; but the Bankrupt Act recognizes no such distinctions and is inexorable in its provisions.

I hold, therefore, that sufficient appears to show that Charles E. Bloss had probable cause to believe that Joseph B. Bloss, the alleged bankrupt, was insolvent, and that he suffered the said Charles E. to obtain judgment, execution, and levy with intent to give him a preference, in violation of the Bankrupt Act, and that therefore the injunction issued in this case ought to be retained and continued till the further order of the court.

The motion to dissolve is therefore denied.

UNITED STATES DISTRICT COURT—NEVADA.

Where an assignee, who is clerk of the bankrupt's attorney, is charged with mismanagement of the estate, and that he sold the property for less than its value, and had been guilty of gross frauds, and his removal is asked by the creditors who are unwilling to intrust the exposition of those frauds to such assignee, and a committee is named to conduct the proceedings on the part of the creditors,

Held, it is expedient that there should be another assignee substituted for the present one. At the same time such order will be made as to fully protect the present assignee against the cost of this proceeding, for it appears from the testimony that he has acted throughout with entire good faith and energy. The costs of this proceeding must be paid out of the estate.

In re MALLORY.

HILLYER, J.—The petition charges that the assignee has mismanaged the estate; that by connivance with others he has sold property for less than its value; that he has failed to make reasonable efforts to recover the property of the estate; that the present assignee is the confidential clerk of the attorney of the bankrupt; that he favors the bankrupt and his attorney; and that the bankrupt has been guilty of gross frauds, and the creditors petitioning are unwilling to intrust the exposition of those frauds to the present assignee.

The petition is signed by three creditors, who, it is alleged, are a committee representing a majority in number and value of the creditors.

The answer of the assignee denies specifically all the allegations of the petition except that he is clerk of the bankrupt's attorney.

All the charges of fraud on the part of the assignee; or connivance with the bankrupt in the concealment of property, have been most successfully met, and were, as a ground for removal, abandoned on the argument.

Something was alleged in the pleading, and more was said on the argument, imputing unprofessional conduct and bad motives to the counsel for the assignee on one side and of the creditors on the other. I can see no shadow of foundation for this on either side, and I regret that either should have felt it necessary to vindicate his conduct in the proceeding by language so bitter and personal as was employed. The character and ability of both gentlemen are too well established to require any vindication from this court, and in the conclusion to which I have come, I have laid aside all consideration of these charges, which are entirely unsupported by proof sufficient to found a suspicion upon. There has been more said about fraud in this matter and less proved than in any case I have ever heard.

I shall proceed to decide only such questions as seem to be properly involved in the case.

It is admitted by the assignee that he solicited from creditors his appointment; that he has done so in other cases, and makes it in some sort a business to procure his election as assignee in bankruptcy. He claims that it is right and proper to do so. The fact of such solicitation has been held to be good ground upon which to withhold the judge's approval of an assignee's election. The creditors should be left free and unbiased in their choice. Such is the policy of the Bankrupt Act. It might lead to abuses if assignees were permitted to do this. (Anon., 2 B. R., 100.)

Whether there has been such an influence exercised by the assignee or not, as to invalidate his election, must be left to depend upon the circumstances of each case.

There might be some solicitation on the part of the as-

signee which would in no way influence the choice of the creditors.

The creditors having knowledge of the action of the assignee in soliciting his own election, and permitting him to qualify and act for six months, as in this case, without objection, it is too late to ask his removal on that ground alone.

Some little evidence was given tending to show that one of the attorneys of the bankrupt interested himself in procuring the election of this assignee, and voted by proxy a large portion of the votes given for him.

Neither the bankrupt nor his solicitors can be permitted to make the proceedings in bankruptcy his proceedings. (*Ex parte* Arrowsmith, 14 Vesey, 209.)

It is clearly wrong to allow the bankrupt to select his assignee. Such an assignee might favor the bankrupt at the expense of the creditors' interests. Eden on Bankrupt Law, 221.)

That the assignee is the confidential clerk of the bankrupt's attorney might be a good reason for withholding the approval of the choice, if objections were made by the creditors before approval, but such objection should be made, if the facts are known to the creditors, immediately after election; and if, with full knowledge of the facts, the assignee is allowed to go on and exercise his duties, something more ought to be shown—some misconduct, or that the relation existing is in some way prejudicial to the rights or interests of the creditors.

A relative of the bankrupt has been rejected (*In re* Powell, 2 N. B. R., 45), and the reason for disapproving the creditors' choice in that case seems to apply with some force to the clerk of the bankrupt's attorney. But there is no restriction upon the choice of the creditors, in the Bankrupt Law, except that the assignee shall not be a creditor who has received a preference, and if creditors, without any undue influence, and with knowledge of the facts, choose such an assignee and the judge approves without objection, it is too late to object.

The creditors argue that the assignee should have recovered

for the benefit of the estate certain property which lawfully belongs thereto.

On the eve of bankruptcy the bankrupt mortgaged to the attorney employed to prepare his petition and schedule, a six-mule team as security for a fee of one thousand dollars for such services. The team was afterward sold by the assignee, subject to the mortgage, and not bringing one thousand dollars, the proceeds of the sale were paid to the attorneys of the bankrupt. No question is made as to the good faith of the assignee in this matter. He has done what he thought to be right—if he has erred. This court does not deem it necessary or proper to decide upon the validity of this mortgage in this proceeding. When it is decided, the parties interested in upholding the mortgage will be heard. Judge Duval (*In re* Evans, 3 N. B. R., 261) held that such a mortgage was clearly invalid, and that the attorneys must prove their debt with other unsecured creditors, but, from the opinion, the point does not seem to have been much discussed, the real question determined appearing to be whether, under the 39th Section, the attorneys would even be allowed to prove their debt.

Evidence was introduced in regard to a team transferred to one Hagerman a short time before the filing of the petition in bankruptcy. It seems to be manifestly improper to decide now that this was or was not a valid transfer under the Bankrupt Law. Mr. Hagerman, the party interested, has not been heard, and this court may be called upon to decide the question upon a fuller hearing, and more complete evidence.

The assignee went so far as to ascertain that Mallory was justly indebted to Hagerman, in an amount equal to the value of the team, and there rested. This might all be; and there might be an entire absence of anything like actual fraud, and yet the assignee be entitled to the property as trustee of the creditors, if the transaction came within the provisions of Section 35. But the assignee must be allowed some discretion, and if he believe the expense of a suit to recover property will be greater than the benefit to be derived from the suit, if successful, he ought not to proceed.

The assignee, in this case, has employed the attorney of the bankrupt as his attorney in some of the proceedings, and the propriety of doing this has been discussed.

So far as my research has gone, the courts uniformly disapprove of the same person acting as attorney for the bankrupt and the assignee, not because the duties always are conflicting and adverse, but because they may be so. The assignee's attorney is a minister of the court, and his duty is to attend to the estate, even to the prejudice of his own claims; and it is considered inconsistent with his duties if he act also as attorney for the bankrupt. (Eldon on Bankrupt Law, 214.)

Lord Eldon once said: "It is astonishing that solicitors of great name will engage themselves as solicitors for assignees, the creditors, and the bankrupts also." (*Ex parte* Arrowsmith, 14 Vesey, 209.)

Again he says: "This case is an instance of the mischief arising from the practice of the assignees and the bankrupt acting by the same solicitor. The adverse duties resulting from those conflicting characters cannot be properly sustained by the same person." (*Ex parte* Vaughan, 14 Vesey, 514.)

It was said on the argument that no attorney of respectability would ever aid the bankrupt in concealing a fraud. Every lawyer knows how, almost unconsciously, he identifies his client with himself, and it is not necessary to assert that he would cover up a fraud knowingly; but he would be less apt than the opposing party to believe that his client had done a wrong. Besides, while an attorney would be as culpable as his client, or worse, if he assisted him in the perpetration of a fraud, still this is a very different thing from defending the client for acts past. Every one has a right to make such defense, and to have the aid of counsel. And to my mind the conduct of the attorney would be as praiseworthy in the latter case as unjustifiable in the former.

A document was introduced in evidence, signed by a majority in number and value of the creditors, as claimed by the petitioners, which is an agreement of the creditors with each other to give twenty per cent. of their dividends for the purpose of

opposing the bankrupt's discharge, and recovering property asserted by them to have been fraudulently disposed of by the bankrupt.

The assignee denies that this document is signed by a majority in number or value of the creditors.

A committee of three is also named in the agreement to conduct the proceedings on the part of the creditors.

Rosebury, who procured the signatures, says, that he told those who signed that the first step would be an application for the removal of the present assignee, and it appears that at a meeting of these creditors, it was also resolved to petition for the assignee's removal.

Section 18 of the Bankrupt Act gives the court power to remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. The removal of the assignee is a matter left to the discretion of the court.

In my judgment, it is expedient that there should be another assignee substituted for the present one. At the same time such order will be made as to fully protect the present assignee against the cost of this proceeding, for it appears from the testimony, that he has acted throughout with entire good faith and energy. But there is, unfortunately, an irreconcilable disagreement between the present assignee and a large portion of the creditors, whose interests and wishes the court is bound to regard while protecting the assignee from any injustice.

The assignee is a trustee of each and every creditor. He receives a compensation for his services, and is held to strict diligence in watching the interest of creditors. The creditors are the beneficiaries, and have a direct pecuniary interest in the bankruptcy proceedings.

Courts of equity sometimes decree a substitution of trustees where there has been no fault on the part of the trustee.

Substitution has been made where the trustees would not act together.

Here are some of the points of difference between the petitioning creditors and the present assignee:

The assignee believes that Mallory has acted honestly—the

creditors that he has been guilty of fraud. The assignee is satisfied that Hagerman is entitled to keep the team—the creditors that it belongs to the estate. The assignee considers the mortgage to bankrupt's attorney valid—the creditors desire to test the question. The creditors think there is property which can be recovered to the estate, in Owen's Valley—the assignee thinks not. Creditors think the bankrupt drew a large amount of money from the bank in January, 1870, and paid to John James, and that this was a fraudulent preference —the assignee is of a contrary opinion. The assignee says that he should employ the attorney of the bankrupt as his legal adviser, and the creditors desire some other attorney. The assignee would change his attorney if directed to do so by the court.

The assignee is sincere in his opinions, and an equal sincerity must be accorded to the creditors.

It was said on the argument, that the assignee would proceed in any manner directed by the court. But it would seem to be manifestly wrong for the court to constitute itself the legal adviser of the assignee. He has a right to choose his own counsel, and must proceed with his duties according to his best judgment, the court holding him to no more than a just and reasonable accountability.

Should the court undertake to direct him when to proceed in a suit, it would find that it had practically decided questions *ex parte* which ought to have been decided only on a hearing of both parties interested.

Upon the questions of cost, I shall allow the assignee to tax his costs against the estate; that is, the cost of this proceeding must be paid out of the estate.

Had it not been for the charge of fraud made against the assignee by the creditors, a charge wholly unfounded and abandoned on the argument, the expense of this proceeding would have been comparatively light. But an assignee could not rest under such a charge, feeling himself innocent, and was fully justified in bringing all the witnesses necessary to rebut the charge and vindicate himself. It is just that the estate should bear these costs.

Upon the whole case it is ordered, that the said R. V. Dey be removed from the trust of the assignee of the estate of said bankrupt, and that the costs of the proceedings for removal be paid out of the estate of said bankrupt subject to prior charges.

UNITED STATES DISTRICT COURT—NORTH CAROLINA.

Proof of a note payable "*in current money of the State*" in which it is made, is, if not otherwise open to objection, allowable; and even though the State in which the note is made payable should at the maturity of the note be in rebellion, and it be claimed that such a demand should not be proved in bankruptcy as payable in lawful currency of the United States, but in the State treasury notes of the State in which the note was made, the objection cannot be sustained, and the owner of the note will be entitled to have his debt estimated at its face, with interest, in lawful money.

In re WHITTAKER.

BROOKS, J.—The opinion of this court is required upon a certificate of Mr. Register Shaffer, filed under the provisions of the 6th Section of the Bankrupt Law.

The certificate of the Register sets forth that Joseph B. Balchelor, the assignee of Whittaker, acting in behalf of the general creditors of the bankrupt, objects to the allowance, at its nominal value, of a note proved and filed by H. O. Parker, as the present owner of the debt, against the estate of the bankrupt.

The following is a copy of the obligation proved and filed:

"Three years after date, with interest from date, we, or either of us, promise to pay to H. B. Whittaker, Two Thousand Dollars, current money of the State, for value received. Witness our hands and seals this 18th March, 1861.

"THOS G. WHITTAKER,
[SEALS.] "S. M. WILLIAMS,
"ALFRED WILLIAMS."

It is contended by the counsel for the assignee that this obligation should be regarded as of the value of two thousand dol-

lars in State Treasury notes, at the time the same became due, to wit: March 18, 1864, and that only such value is now due, together with interest from the former date to the present time.

The counsel for the creditor (Mr. Parker), on the other hand, contends that this obligation is solvable only in good and lawful currency of the United States. That such is the true and legal import and meaning of the words "current money of the State."

This leads us to the inquiry whether North Carolina Treasury Notes, such as were from time to time issued and put in circulation during the rebellion, was "current money of the State," within the legal import and meaning of that term.

After a full consideration of the question, I am of the opinion that they were not, and indeed could not, be current money of any State for the payment of debts, while the express prohibition remains in the Constitution of the United States against the emission of bills of credit by the State.

It may be conceded that the expression "current money of the State," is sufficient to show that it was intended by the parties to this contract that it should be paid with a medium or money other than gold or silver coin, but this would not justify the conclusion that unlawful money should be received at any value, in discharge of the obligation.

To say nothing of the unlawful purpose with which all the issues or emissions of North Carolina treasury notes were made, no act could be more clearly in violation of the 10th Section of the Constitution than all the different issues of treasury notes were, whether made under the provisions of ordinances of the convention or acts of the Legislature.

That which the supreme law declares shall not be made, surely cannot be authorized by any inferior or subordinate power, not only to be made, but so emitted as to answer the important uses of current money.

I would not be understood as declaring that an obligation promising to pay any given amount in North Carolina treasury notes was void (if a medium answering that description was in circulation at the date of the contract); however clearly such

medium or money might have been created in violation of the Constitution or in hostility to the Federal Government, unless it should appear that the contract upon which obligation was based, was in some way conducive to the violation of the law, for the contrary has been decided by the Circuit Courts, and more recently by the Supreme Court of the United States in the case of *Thorington* v. *Smith*, 8 Wallace, 1. In that case the contract between the parties was held to be for the payment or delivery of a stated sum *in Confederate Treasury Notes*. And the court say, that in the absence of proof that the contract between the parties was made *with the view and intent* to further the rebellion by giving circulation to the money, or in some other way aiding in hostilities against the Government, on such a contract the value of the Confederate money at the time of payment, if it had any, might be recovered: upon the principle that the Confederate money, while it had a value in the markets, when not used in any contract in aid of the rebellion, was as any other commodity; and a party might, if he saw proper, accept an obligation from another to pay or deliver it.

Then we must inquire what medium was contemplated by the parties to this contract, as receivable in discharge of it at the end of three years from March 18, 1861.

Surely North Carolina treasury notes were not contemplated; for to attribute to the payers in the note such foresight, would be giving to him the character of a prophet.

That though no such medium or money as North Carolina treasury notes existed, yet such would be issued if the Constitution should be so altered as to permit it, and if not, that they would be made in violation of it; and yet such a construction would deny to him the forecast to see that after the notes would be issued, they would also become almost wholly worthless, and this before the maturity of his note!

North Carolina treasury notes surely were not contemplated by the parties to this contract at the time the same was made.

Then what *was* contemplated as receivable and payable in discharge of the note?

Chief-Justice Chase, in delivering the opinion of the court in *Thorington* v. *Smith*, says:

"It is quite clear that a contract to pay dollars, made between the citizens of any State of the Union while maintaining its constitutional relations with the national Government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence."

North Carolina had, in no legal sense, defied the authority of the United States until after March 18, 1861.

The same eminent judge, in a case recently before him in the Circuit Court of Virginia, declared that a contract for payment *in current money of Virginia*, was not solvable in Virginia bank notes, after they had fallen in value to a greater percentum than eleven per cent. compared with any legal tender medium.

Is it not more reasonable to suppose that all the parties contemplated payment in some lawful money of the United States, or other medium of equal or very nearly equal value, in some medium which the law would regard as current at maturity?

This is the conclusion to which I have arrived from the language employed in expressing the contract, and from all attendant circumstances.

It is admitted that the proof of debt is regular. That H. O. Parker is the *bona fide* owner by indorsement of the debt, and I have assumed that all the parties were residents of North Carolina at the date of the contract. If it were otherwise, however, it would not be more favorable to the assignee.

In the distribution of the assets of this estate, the creditor, H. O. Parker, is entitled to have his debt estimated at two thousand dollars, with interest from the 18th of March, 1861, in lawful money.

Let this be certified to A. W. Shaffer, Register.

UNITED STATES DISTRICT COURT—CALIFORNIA.

Application for leave to commence a suit against the bankrupt will be entertained and leave granted to begin an action for a debt to which the bankrupt's discharge would not be a bar, if it appears that if not commenced forthwith the Statute of Limitations might run against it, or that service might not be obtained upon the bankrupt afterwards, or that testimony might be lost: and the court will then stay the suit to await the determination of the question of the debtor's discharge or the expiration of a reasonable time to make application therefor. But where no such reasons are offered for leave to commence a suit, the court will deny an application therefor.

In re GHIRARDELLI.

HOFFMAN, J.—Certain creditors of the bankrupt in this case have appealed to the court for leave to prosecute suits against him for debts alleged to have been created by his defalcation while acting in a fiduciary capacity, to wit: As administrator of the estates of certain parties deceased.

These debts have been duly proved against the estate. The application is opposed by the trustee appointed by the creditors.

The 21st Section of the Bankrupt Act provides that, "No creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined."

The case presented is clearly within the terms of this prohibition.

It is urged, however, that inasmuch as the debts in question will not be released by the discharge, there can be no reason for restraining suits to enforce them until the happening of an event which can in no way affect the creditor's rights.

But to this limitation of the general language of the 21st Section there are grave objections. The object of the provision was to prevent the bankrupt from being harassed during the proceedings to obtain his discharge by suits to recover provable debts. This object would be in a great measure defeated, if on the mere allegation that the debt was incurred by the bankrupt while acting in a fiduciary capacity, or was created

by fraud, the creditor could institute and carry to final judgments suits before the ordinary tribunals.

The only ground for refusing the stay of proceedings which the Bankrupt Court is by Section 21 required to grant, would be the fact that the debt was of the character mentioned in the 32d Section. But that fact might be disputed, and before the court could act, a protracted and expensive investigation might be necessary.

But this investigation would in no respect be a final adjudication, for if a suit in a State court should be commenced after the discharge, to which the discharge should be pleaded as a bar, the truth of the plaintiff's replication that the debt was excluded from the operation of the discharge would be open to inquiry and would necessarily be passed upon by the court. So, too, if no discharge should be granted the investigation by this court into the nature and origin of the debt would be wholly useless.

The stay authorized by the statute is but temporary. It terminates with the decision of the court on the question of the discharge, or sooner, if there be unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge.

The attempt to determine in advance what will be the effect of the discharge upon particular debts, when as yet it is not known whether any discharge will be granted, seems premature and unnecessary.

The creditor, the debt to whom was created by fraud, is not more inconvenienced by the temporary suspension of his right to sue, than the ordinary creditor who may know of facts which will prevent the discharge, but yet is prohibited from suing. In neither case will the proceedings in bankruptcy be a bar to a subsequent suit. But in both, the statute requires that a temporary stay of proceedings shall be granted by the court.

The provisions of the 26th Section with regard to the arrest of the bankrupt, have no application to the subject we are considering.

That section enacts that "No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in

any civil suit, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him."

The 27th General Order provides that a bankrupt so arrested may be brought before the District Court by *habeas corpus;* and if it be ascertained that the process on which he is arrested has been issued for the collection of any claim provable in bankruptcy, he shall be discharged.

It would seem that this general order carries the exemption of the bankrupt from arrest further than is warranted by the statute; for the latter, by plain implication, allows an arrest for a debt or claim from which the bankrupt would not be released by his discharge. *In re* Glaser, 1 N. B. R., 336.

The rule was perhaps inadvertently framed, and was intended merely to prescribe the mode in which the immunity given by the act might be secured and enforced, but not to extend that immunity to cases where the act clearly shows that none was to be allowed; or, perhaps the Supreme Court referred in this rule to cases of preliminary arrest at the commencement of a suit. As the 21st Section provides for a stay of all suits for debts provable under the act, the General Order requires the discharge of the bankrupt when arrested in any such suit; otherwise the proceedings might be stayed, but the bankrupt would remain in prison. But where the arrest is on final process issued after judgment, the discharge of the bankrupt would depend upon whether the arrest was for a debt from which his discharge in bankruptcy would release him.

If this be the true construction of General Order No. 27 (and I see no other by which it can be reconciled with the exception contained in the clause of the 26th Section relating to arrests), it affords an argument in favor of the interpretation given to the 21st Section; for it seems to indicate the opinion of the Supreme Court that no creditor whose debt is provable under the act, shall be allowed to maintain or prosecute to final judgment any suit therefor, until the question of the debtor's discharge shall have been determined.

In re Seymour, 1 N. B. R., 29, it was held by the District

Judge for the Southern District of New York, that the provisions of the 21st Section do not extend to suits to collect debts from which the bankrupt would not be released by his discharge in bankruptcy.

But in the case of Rosenberg, 2 N. B. R., 236, the same learned judge reconsidered this opinion and held that Section 21 must be construed to include all suits to recover debts provable under the act. His reasons are substantially those given in this opinion. His large experience and the great attention he has bestowed upon the Bankrupt Act, and questions arising under it, entitle his mature and well-considered opinion, especially where he admits a previous error, to the greatest consideration.

But while the act forbids the maintaining or the prosecution to final judgment of any suit for a debt provable under the act, it does not in terms prohibit the commencement of such a suit. Whenever, therefore, it appears that the suit is one to which the discharge in bankruptcy would be no bar, and that, if not commenced forthwith, the statute of limitations might run against it, or that service might not be obtained upon the bankrupt, or that testimony might be lost, I am inclined to think the court might permit the suit to commence for the purpose of saving the statute, effecting a service, or securing testimony. When these objects are attained, the suit could be stayed to await the determination of the question of the debtor's discharge, or the expiration of a reasonable time therefor.

But a special showing should in such case be made, and leave to prosecute would be granted only so far as might be absolutely necessary to secure the creditor's rights. No such showing has been made in this case, and I am therefore of opinion that the application should be denied.

UNITED STATES SUPREME COURT—UTAH.

Where a mortgagee fails to secure an equitable lien by bill and the appointment of a receiver on products or rents of mortgaged premises after a default, even though the premises sell for less than his claims at a sale by the mortgagor's assignee in bankruptcy, he will only be entitled to a *pro rata* share on the deficiency of his claim out of the bankrupt's assets. Products of the mortgaged premises reduced to possession by the mortgagor's assignee in bankruptcy prior to sale of the mortgaged premises, are to be treated as assets to be distributed under the Bankrupt Act, and the mortgagee cannot claim that a deficiency after sale on his mortgage shall be paid in preference to the claims of other creditors.

In re SNEDAKER.

HAWLEY, J.—The question for adjudication arises on the petition of F. D. Clift, praying for an order directing the assignee in bankruptcy to pay to said petitioner the proceeds of hay cut on the mortgaged premises of the bankrupt, in possession of the bankrupt under said assignee.

Upon the hearing the parties conceded the facts to be, that on the 22d day of May, 1869, there was made and filed of record, by the said bankrupt, a certain mortgage, conveying thereby certain real estate therein mentioned to the said Francis D. Clift to secure the payment of a note, as follows:

"SALT LAKE CITY, *May 22d*, 1869.

"One year after date, for value received, I promise to pay to the order of Francis D. Clift, the sum of six thousand dollars, lawful money of the United States, with interest thereon at the rate of two per cent. per month from date, until paid. Interest to be paid monthly as it becomes due and payable. But if the interest is not paid at the time, the interest shall draw interest at the rate of five per cent. per month until paid.

"M. J. SNEDAKER."

One of the material conditions of said mortgage was, that the mortgagor should pay, or cause to be paid, the said note with interest when due according to the effect of the same; with the further agreement, that if the interest is not paid

punctually when the same becomes due, then the principal and interest shall be deemed and be taken to be wholly due and payable, and "proceedings may forthwith be had by the said party of the second part, etc., for the recovery of the same, either by suit on said note, or on this (said) mortgage," and to include in the judgment that may be recovered, counsel fees and collection fees, and charges of attorneys and counsel employed in such foreclosure suit, etc.

It was further admitted that Snedaker, on the 16th day of November, 1869, filed in this court his petition in bankruptcy, and was duly adjudged a bankrupt, and that H. J. Faust was appointed his assignee in bankruptcy; that default was made in the payment of the monthly interest on the 22d day of October, 1869; that on the 22d day of January, 1870, Clift, the mortgagee, filed his bill in equity, in the Third Judicial District Court, to foreclose said mortgage; that Faust, the said assignee, immediately thereafter filed in this court his bill to restrain said foreclosure, and prayed that the said mortgagee be compelled into this court, with said mortgage, that the said mortgagee's interest might be disposed of by said assignee, under the direction of this court, pursuant to the Bankrupt Act; that upon the hearing, this court so adjudged, and issued an injunction against the said mortgagee, restraining him from further procedure in that matter; and further ordered that the said mortgaged premises be disposed of by the assignee, subject to the said mortgage lien, in conformity to the Bankrupt Act. (*In re* Snedaker, 3 N. B. R.) That prior to the sale of the said mortgaged lands, to wit; prior to the 16th day of July, 1870, the assignee, the mortgagor being in possession, entered upon the said lands, in the season of cutting grass, in connection with the mortgagor cut and harvested the grass grown thereon, a part of which he sold, and the balance he has now in his possession as assignee aforesaid; that since the cutting and harvesting of said grass, the assignee sold the said mortgaged premises by virtue of said mortgage, and paid over the net proceeds thereof of five thousand two hundred and fifty-one dollars to the said mortgagee, leaving a balance still due

him of two thousand one hundred and forty-six dollars and fifty cents, which said balance has been duly proved up before the assignee; that after the said mortgage sale was duly advertised, by the mutual agreement between the assignee and mortgagee, the sale was postponed, to take place on the day last mentioned; that the said bankrupt had many other creditors who had duly proved their claims, and that the assets are wholly inadequate to pay the same in full.

Under these facts, the mortgagee, by his petition, claims of this court an order directing the assignee to pay to him all the proceeds of said hay, to the exclusion of all the other creditors.

On the other hand the assignee, on behalf of the other creditors, claims a *pro rata* share of the same.

Both base their respective claims on equitable grounds. No case of the kind has been to our knowledge adjudicated in the bankrupt courts; at least we find no decision in the books that covers the precise facts of this case.

By reason of the fact that the common law pertaining to mortgages was derived from the Roman or civil law, we will refer to it, inasmuch as by its light we may more fully understand its principles touching the question before the court.

Dumat, in his Civil Laws, says: "Although the mortgage be restrained to contain things, yet it will nevertheless extend to all that shall arise or proceed from the thing which is mortgaged, or that shall augment it and make part of it. Thus, the fruits which grow on the lands mortgaged, are subject to the mortgage while they continue unseparated from the ground. Thus, when a stud of horses, a herd of cattle, or a flock of sheep is put in pawn into the creditor's hands, the foals, the lambs, and other beasts which they bring forth, and which augment their number, are likewise engaged for the creditor's security. And if the whole herd or flock be entirely changed, the heads which renewed it are engaged in the same manner as the old stock." Dumat's Civil Laws, Section 1662. He further says, "Movables in the custody of the debtor may be taken into possession or seized upon by the creditor or mort-

gagee, or may be attached by leave of the court, except when the debtor is insolvent; then there was no preference in favor of any creditor, unless such as have some privilege." *Ib.*, Section 1656. But, he says, this privilege "is to be understood only of the augmentations or accessories, which are a part of the thing that is mortgaged, and does not extend to that which is the proceed of it, but is separate from it and changes its nature. If one takes timber out of a forest that is mortgaged, to employ it in building, or in making a ship, the mortgage which one has on the forest will not extend to this timber that has been taken out of it." *Ib.*, Section 1664 and note *w*. He also says, "If a debtor lays out money arising from the fruit of the mortgaged lands on the purchase of a new estate, this new purchase, although proceeding from the fruits which were subject to the mortgage, will not be subject to it." *Ib.*, Section 1668. He further says, "If a creditor has a mind to take possession of his pledge by virtue of an agreement which entitles him so to do, and the debtor opposes it, he cannot turn the debtor out of possession by force; but he must have recourse to justice, to be put into possession by the authority of the judge, who will give him possession if he sees that he has a right to it." *Ib.*, Section 1721.

Chancellor Kent says: "The English law of mortgages appears to have been borrowed, in a great degree, from the civil law; that the Roman *hypotheca* correspond very closely with the description of a mortgage in our law." 4 Kent Com., 136. He also says: "The mortgagor cannot be treated by the mortgagee as a trespasser, nor can his assignee, until the mortgagee has regularly recovered possession, by writ of entry or ejectment. The mortgagor in possession is considered to be so with mortgagee's assent, and is not liable to be treated as a trespasser." *Ib.*, 155–7; *Fitchburg* v. *Melvin*, 15 Massachusetts, 268; *Wilder* v. *Haughton*, 1 Pick., 87.

In case of forfeiture, the mortgagor had a right in equity to redeem his pledge. The object of this rule, says Chancellor Kent, "is to prevent oppression; and contracts made with the mortgagor to lessen, embarrass, or restrain the right of redemp-

tion, are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscious advantages assumed over the necessities of the mortgagor." 4 Kent Com., 158, 9. He further says: "The equity doctrine is that the mortgage is a mere security for the debt, and only a chattel interest, and that until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee in law; and it is accordingly held to be descendible by inheritance at law. The courts of law have, also, by a gradual and almost insensible progress, adopted these equitable views of the subject, which are founded in justice, and accord with the true intent and inherent nature of every such transaction. Except as to the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner and freeholder, with the civil and political rights belonging to that character; whereas the mortgagee, notwithstanding form of the conveyance, has only a chattel interest, and his mortgage is a mere security for a debt. This is the conclusion (says Chancellor Kent) drawn from the English and American authorities; that the right of redemption exists not only in the mortgagor, but in his heirs and personal representatives and assignee, and in every other person who has an interest in, or a legal or equitable lien upon, the lands. *Ib.*, 160, 161, 162.

On the other hand he says, "The mortgagee may, at any time, enter and take possession of the land by ejectment or writ of entry, though he cannot make the mortgagor account for the past or by-gone rents, for he possessed in his own right and not in the character of the receiver." *Ib.*, 164, 165. "If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the actual receipts of the net rents and profits." *Ib.*, 166, 167.

Such are the rules of both the civil and common law governing the rights of the mortgagor and mortgagee in cases like the one at bar; and as we have seen by the rules laid down by Chancellor Kent, the common law of the United States in nowise differs from these rules.

These rules were fully recognized as of force in Massachusetts in the case of *Wilder* v. *Haughton*, 1 Pick. 88, 89, in an action to recover from an assignee of the mortgagor the *mesne* profits received by him since the commencement of a suit. Chief Justice Parker, in deciding the case said, "The defendant (the assignee) stands in the place of the mortgagor, so that the question submitted is the same as if the present action were between the mortgagee and mortgagor; and in this view it must be considered an experiment, no such action having been hitherto brought, either in this country or in England, as far as we can discover from the books. The mortgagor is, it is true, considered a mere tenant at will, and according to our practice, and to the decisions of the Court of King's Bench, reported in Douglas, 21, he may be ejected without notice to quit, yet he is in many respects the owner of the land, and when left in possession, there must be an implied understanding that he is to occupy and improve in the same manner as before the execution of the mortgage. It is true that when the mortgage is not full security for the debt, the profits would be useful to the mortgagee as a means of payment: but to obtain them he should enter early, or bring his writ of entry, which he may do immediately upon the execution of the deed; if he chooses to lie by, and suffer the mortgagor to keep possession, he consents that the intermediate profits may be received by him, and held without account." (See 1 Hilliard on M., 166–7, and note *c.* to p. 161.)

But on the other hand it was insisted by counsel on the argument that when the mortgagor is insolvent, and the mortgaged premises are of insufficient value to pay the secured debt, that the mortgagee is entitled to the profit, growing crops, or rents, before entry or foreclosure and sale, or the filing of a bill in equity for a receiver; and the case of *Astor* v. *Turner*, 11 Paige, Ch. R., 436, is cited to sustain this position. On examination of this case, we find that the syllabus quoted from does not accurately present the decision of that case; so far from it that in fact it supports in the fullest sense the doctrine laid down by Chief Justice Parker in the case of *Wilder* v. *Haugh-*

ton, 1 Pick., 88, 89, above cited. Chancellor Walworth, in the case of *Astor* v. *Turner*, 11 Paige, 436, said, "The holder of a mortgage which has become due, and where the proceeds of the mortgaged premises are not, or when they probably will not be sufficient to pay his debt and costs, and where the mortgagor or other person who is personally liable for the deficiency is insolvent, may apply for a receiver to secure the rents and profits of the mortgaged premises, *which have not yet been collected.* In this way he may obtain a specific lien upon the rents and profits to pay such deficiency, or anticipated deficiency; although he cannot call upon the owner of the equity of redemption in the mortgaged premises to refund rents and profits which the latter had collected or received, before the mortgagee attempted to get a specific lien upon such rents and profits, by the appointment of a receiver. See also *Howell* v. *Ripley*, 10 Paige, 43. This case fully sustains our position, that a mortgagee, though his security be not sufficient to pay his debt, can only acquire even an equitable lien upon the rents or profits by bill and the appointment of a receiver, before the growing crop is severed, or the rent is collected and become vested in the mortgagor or his legal representative in possession. (See *Post* v. *Darr*, 4 Edwards, 412; *Lopsky* v. *Manger*, 3 Sanford, ch. 69).

In the case of *Ryall* v. *Rowles*, 1 Vesey, 348, which depended upon the Bankrupt Law, Justice Burnet held that, "In equity a first mortgagee will be postponed, if he neglect to take the mortgaged premises into his possession. He is punished for this as a fraud." (See 2 Hilliard on M., 356.)

At common law assignees under general assignments, such as assignees in cases of bankruptcy and insolvency, take such and only such rights as the assignor or debtor had at the time of the general assignment. (See 2 Story Eq. Jur., Section 1038, 1040.) The Bankrupt Act of 1867, Section 14, more than embraces this principle in providing, "That as soon as said assignee is appointed and qualified, the Judge, or where there is no opposing interest, the Register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real

and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, etc.; all rights in equity, choses in action, patents, patent rights; all debts due him, or any person for his use, and all liens and securities therefor; all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention, or of injury to the property of the bankrupt; and all rights of redeeming such property or estate, with the like right, title, or power and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt had, or could have had if no assignment had been made, shall, in virtue of adjudication of bankruptcy and the appointment of his assignee, be at once vested in such an assignee. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same, subject to such mortgage, lien, or other incumbrances."

The status of the parties in interest in the suit at bar, or their relation to each other, as mortgagor, mortgagee, and the assignee of the mortgagor in bankruptcy, at the time of filing the petition in bankruptcy, was fixed when and by the filing of said petition. The adjudication of bankruptcy fixed the several rights of said parties in interest as they were, or as said filing found them, for the appointment of the assignee took effect by relation back to the time of said filing of the petition; and rights, equitable or otherwise, not actually acquired or secured by lien by bill, and the appointment of a receiver, remain unacquired or unsecured, as the case may be. What might have been made an equitable lien by the mortgagee, but which was not in fact secured, cannot now be made available to his exclu-

sive benefit; for by the filing of the petition in bankruptcy, the adjudication and the appointment of the assignee by relation back, elevated the unsecured creditors to the position of creditors with the mortgagee on an equitable basis for what was justly due them upon sale of the mortgaged premises. Hence their equities in the bankrupt's remaining assets can no more be postponed to the mortgagee than his balance due can be to theirs.

By reference to the mortgage lien, we find one of its material conditions to be, "That if the interest on said promissory note shall not be punctually paid when the same becomes due and payable, as in said promissory note mentioned, then and in that case the principal sum of said promissory note and the interest shall be deemed and taken to be wholly due and payable, *and proceedings may forthwith be had* by said party of the second part, etc., for the recovery of the same, *either by suit on said note, or on this mortgage.*"

By this provision the mortgagee cannot enter upon and take possession of the mortgaged lands, without suit, and then not until he is authorized so to do by sale under the judgment decree of court. The mortgagee, in his said petition, it is true, avers that default was made in the payment of the two per cent. interest per month, on or about the 22d day of October, 1869; but, without filing a bill in chancery for a specific lien, and the appointment of a receiver, and fifty-seven days after the petition in bankruptcy is filed, to wit: on the 22d day of January, 1870, the mortgagee filed his bill of foreclosure in the Third Judicial District Court. In this, his bill of foreclosure, he does not allege or aver that the said mortgaged premises are of insufficient value to pay his debt, nor does he ask for the appointment of a receiver to take charge of the ripening fruits or grass grown thereon that will mature before the sale under said mortgage, for his exclusive benefit. But after the grass is harvested and reduced to personal property by the mortgagor and assignee, and after the mortgage sale, and nine months after the petition in bankruptcy is filed, he files in this court his petition, asking this court, at this late day, to give him all

the money arising from this harvested hay, to the exclusion of the rights of the unsecured creditors in the Bankrupt Court. Under such circumstances has he an equitable standing in this court, for such proceeds, to the exclusion of the other said creditors? We know of no rule of law or equity that will permit the allowance of such a claim under such circumstances. And, besides, it will be borne in mind, that not until the 22d day of January, does the evidence show that the mortgagee elected to treat the principal sum and interest as due.

Prior to this time, in legal contemplation, he is presumed to have elected to rely upon the said five per cent. interest per month upon the unpaid two per cent. interest per month, provided for by the agreement in said note contained. (*Zeiter* v. *Bowman*, 6 Barbour, 140.) Before he elected to so declare or treat the note as due as aforesaid, the petition in bankruptcy was filed, which brought into this court all the other creditors of the said mortgagor with their *pro rata* rights to the balance of the bankrupt's estate.

As we have already intimated, had there been no proceedings in bankruptcy commenced, and had the bill of foreclosure gone on, predicated, as it was, solely upon the mortgagee's rights under his mortgage, and had the sale under the decree of foreclosure been advertised, before the cutting of the grass, and that by the mutual agreement between the mortgagor and mortgagee, the sale was postponed to a certain day, to wit, the 16th day of July, 1870; and that before the sale had actually taken place on the said adjourned day, the hay had been cut, and a part sold, and the balance was still in possession of the mortgagor, the mortgagee would thereby have lost all equitable claim for a lien upon the hay and proceeds, and would have lost all right to create in equity a lien upon the same. If such is the conclusion of the law, then by no rule of equity can he justly claim an equitable right in this court, to the exclusive application of such proceeds to his debt.

It will also be borne in mind that, as a matter of fact, at the time of the filing of the said bill of foreclosure, there was no growing grass or fruit upon the mortgaged lands, and as a

matter of course, there could not have been any ground for an equitable lien had he laid the foundation in his said bill for such lien. This court cannot make a case for an equitable lien upon the proceeds of said harvested hay, which the mortgagee, by his laches, omitted to make for himself.

For these reasons the motion of the petitioning mortgagee must be denied, and an order issued directing the assignee in bankruptcy to distribute the said proceeds of said hay *pro rata* among all the creditors of the said bankrupt in coformity to this decision.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Involuntary proceedings may be instituted against a debtor, although the debt is not yet due, if it is a provable debt.

A creditor who holds a mortgage upon the property of his debtor, can proceed against the debtor, by petitions in bankruptcy, provided the security falls short of a full indemnity by two hundred dollars or more.

In re W. B. Alexander.
In re J. F. Alexander.

Lowell, J.—These are petitions for involuntary bankruptcy, and they have been heard together by consent of the parties. The defendant, James F., bought out the stock in trade of the petitioner in February, 1869, for about two thousand four hundred dollars, of which five hundred dollars was paid down, and for the remainder the two defendants gave their joint and several promissory notes on one, two, three, and four years, with interest at eight per cent. per annum, payable semi-annually, and secured by a mortgage on the stock in trade. William B. is the father of the other defendant, and had no interest in the purchase, but joined in the notes for the greater security of the petitioner, and between the two defendants is a surety only, and is so alleged to be in the petition. In February, 1870, the first note became due and was paid, together with the interest on the whole debt. The next note will be payable in February, 1871. On the 13th of February last, the

father conveyed his dwelling-house and land at East Boston, to his wife. He is not and never has been a trader, and he has no other estate or effects liable to seizure on execution, and he owes no debts except to this petitioner.

In March the son conveyed to his wife a dwelling-house and land which had stood in his name for about two years. Evidence was admitted, *de bene*, to show that he held the house by gift from his father-in-law, upon an oral trust, or understanding that it should be used, enjoyed, and conveyed for the benefit of the grantor's family, including the defendant's wife. The conveyance to the wife was made without the consent or knowledge of the father-in-law, who heard of it but lately, and says he acquiesced. This defendant owes no debts of consequence, excepting the mortgage debt, and one to his aunt, of whom he borrowed the five hundred dollars paid out in the first instance towards the purchase of this stock.

The evidence tends to show that this debt would not be pressed against him. Several points of law have been fully and ably discussed before me, and I will consider them in their order. The fact that the petitioner's debt is not yet payable, is not a valid answer to this proceeding. By Section 39 all creditors whose debts are provable under the act may petition, and by Section 19, debts existing but not payable until a future day, are provable. This is decisive. But I may add that such has been the decision of the only court whose opinion I have seen. And a similar judgment was given under the act of 1841, *Barton* v. *Tower*, 5 Law Rep., 214, and the practice has always been so under the insolvent law of this Commonwealth.

The next objection is that a creditor who holds security cannot petition. Here an important distinction is to be noted. This creditor has no security upon the property of William B. Alexander, and the language of Section 20 is, that a creditor who holds security upon the property of the bankrupt, shall be admitted to prove only for a balance, etc. This would seem to show that the petitioner has a provable debt for the full amount against the estate of the *father*, because his only security is on

the estate of the *son*. Such has always been the practice in England, and I am inclined to think it the true practice. If the surety pays the debt, he may be entitled to the benefit of the collateral security. But in bankruptcy it seems more just and equitable that the creditor should have the benefit of all his remedies, so that he may obtain his whole debt, if possible. If he is obliged to realize his security and prove only for a balance, he will be losing the advantage for which he has stipulated, of the full credit of the promise of the surety.

A contrary doctrine appears to have prevailed in Massachusetts (*Lancton* v. *Wolcott*, 6 Met., 305), but I am not prepared to say that I could follow that precedent. It is not necessary to decide the point in this case, for reasons which will presently appear.

The next question is, whether a creditor who holds a mortgage upon the property of his debtor, can proceed against that debtor himself by petition in bankruptcy. By Section 20 such a petitioner can be a creditor only for the balance, after deducting the value of the property, which value is to be ascertained by agreement with the assignee, or by a sale under direction of the court. The argument is, that, until an assignee is appointed, it cannot be legally ascertained whether such a mortgagee is a creditor or not. This appears to me to be too strict and literal a construction. Take the case of an admitted act of bankruptcy and of creditors whose security is plainly inadequate. Are they to be without remedy? No better illustration than this case affords, could be desired. If this creditor cannot petition, there is no other person who is interested to do so, and, after six months has passed, he is without remedy. I have known a case in which all the creditors were secured, and none of them adequately. The true intent and equity of the statute will be met by holding that when the security falls short of a full indemnity by two hundred and fifty dollars or more, that being the amount of a petitioning creditor's debt, practically unsecured, the debt is sufficient. This will be a question of fact like any other, and no more difficult to decide as such as often arise on a disputed account or other debt sufficient in

kind. This is the law of England by express words of 24 and 25 Victoria, Chap. 134, Section 97.

I do not wish to be understood that a creditor holding collateral security may not petition if he offers to surrender and cancel his security, nor that any security by attachment or other lien created by law, would usually be a bar; but my opinion is that full and adequate security created by contract must be abandoned, and that, if inadequate, it must be so to the extent above mentioned. Nor is it to be understood that it is any defense in bankruptcy that the petitioner is the only creditor, or that he has an adequate remedy at law or in equity in the State or Federal courts. The Bankrupt Law protects all creditors, and is additional to other remedies in all cases to which it applies.

This creditor alleges in his petition, and has proved to my satisfaction, that his security falls short by more than two hundred and fifty dollars, and I must hold him entitled to proceed. Have the acts of the bankruptcy been established in evidence?

It appears that William B. Alexander has conveyed a homestead of some considerable value, and which was his whole property, to his wife. The effect necessarily is to delay creditors, and the intent ought to be presumed. The defendant testifies that his only purpose was to give his wife a home, and that the petitioner's debt was not in his mind at the time. But he was not in trade; there was no one but this creditor against whom the homestead needed protection, and the intent to give his wife a clear homestead, necessarily involves the intent that the creditor should not reach it. I have often decided that the conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent, so far as existing creditors are concerned. In the case of the son, the evidence is not so clear that he had anything to convey. But, considering that by the statute of frauds of this Commonwealth, parol evidence could not be admitted to prove such a trust as is here relied on, so that in case of attachment or of bankruptcy before the conveyance was made, the beneficial interest would be conclusively held to be in the defendant; I doubt if he ought to

be admitted to show these alleged facts, even on the question of intent. But if the evidence is received, still the peculiar circumstances of the case seem to show that the defendant may have had some beneficial interest which he intended to withdraw from the grasp of his creditors. Such seems to be a fair inference from the time and mode of the conveyance.

It must be remembered that the father and son made their deeds near about the same time, which was soon after the payment of one of the annual notes, and that it must then have been evident to them that the stock in trade had been reduced in value below the amount of the mortgage debt; that there were no other creditors and no apparent adequate motive for the acts, excepting the wish to confine the mortgagee to the property secured to him, and I cannot but think it a fair inference of fact, independently of legal presumption, that the real intent was to delay and hinder the petitioner.

It was shown that the petitioner had acted in a harsh and even oppressive manner towards the defendant James, in respect to the foreclosure of the mortgage. This evidence was admitted only for its bearing upon the credibility of the petitioner, who was a witness in the case. I may, however, be permitted to observe that this seems to be a case in which the parties would do well to compromise the matter by giving the petitioner adequate security for his debt. It is unfortunately true that the expenses in bankruptcy bear a very large proportion to that part of the petitioner's debt which remains unsecured. Still it is not a matter of discretion, but of strict right, that he should be permitted to proceed here if he chooses to do so.

J. D. Ball, for petitioner.

J. H. Bradley, for respondents.

SUPREME COURT—GEORGIA.

1. Security on an appeal bond, under our code, only binds himself for the payment of the debt or damages for which *judgment may be entered* in the cause, and if no judgment is ever entered against the principal in the cause, no liability attaches to the security.
2. As Congress has the power, under the Constitution, to establish uniform laws on the subject of bankruptcies throughout the United States, and, as the Act of Congress forbids the prosecution of an action against a person adjudged a bankrupt until the question of his discharge has been determined, and relieves him, when discharged, from all debts and liabilities, etc., which might have been proved against his estate, a security on the appeal in this State is no longer liable when the principal is discharged in bankruptcy, which discharge of the principal terminates the case pending in the State court against him, and prevents any judgment. The security on the appeal does not contract to pay the debt, but the judgment that may be entered in the suit then pending.

ODELL *v.* WOOTTEN.

Odell sued Wootten, and had judgment. Wootten appealed to the Superior Court, giving security, and there plead that, on the 19th day of May, 1868, he had been duly adjudged a bankrupt (vouching the record of the discharge), and was thereby discharged from said demand. Plaintiff's attorneys demurred to said plea, contending that, though Wootten was so discharged, they had a right to proceed to judgment against the security on the appeal.

The court overruled the demurrer, and ordered the case dismissed at plaintiff's costs. This is assigned as error.

Hammond, *Mynatt* and *Welborn*, for plaintiff.

Hill & Candler, for defendant.

BROWN, C. J.—The defendant in this case became security on an appeal bond, executed for the purpose of taking an appeal from the judgment of the County Court to the Superior Court, as provided by law, prior to the adoption of our new Constitution, by which such an appeal is no longer allowed. The effect of the appeal was to bring up the whole case for a new trial before a special jury.

After this appeal was entered, the principal in the court below, who had entered the appeal, was adjudged a bankrupt,

and was fully discharged as such in the proper court. And the question presented for our adjudication is, did this discharge of the principal, discharge the security on the appeal? We think it did.

First. The Revised Code, Section 3559, provides, that the appellant, before entering such appeal, shall pay all costs which may have accrued, and give bond and security for the eventual condemnation money.

Section 3564 declares, that such security shall be bound for the *judgment* on the appeal, and that he may be compelled to pay off the debt or damages for which *judgment may be entered.* This is the extent of his liability. He does not contract to pay the debt or damages absolutely, but only the debt or damages for which "judgment may be entered," on the trial of the appeal. To illustrate: Suppose A sues B in an action of assumpsit on a promissory note under seal, and the *petit jury* renders a verdict in his favor, and B enters an appeal to a special jury, and C signs the appeal bond as security, as the statute terms it. After the appeal, A finds that he cannot maintain his action of assumpsit on the sealed instrument, and he dismisses it, and afterwards begins an action of debt against B for the recovery of the same amount, due on the same promissory note under seal; will it be contended that C, the security on the appeal in the first action, which has been dismissed, is liable for the judgment that may be entered against B in the second action? Certainly not. C did not become a surety for the payment of the debt, he only contracted to pay the judgment that might be entered in the action then pending; and when that case went out of court, the liability went with it. In other words, as no judgment was rendered against his principal, no liability attached to him.

Second. But it is insisted by counsel for plaintiff in error, that the Act of Congress known as the Bankrupt Act, Section 33, is the paramount law on this subject, and that it enacts, that the discharge of the principal as a bankrupt, shall not discharge the security. A careful perusal of the act will show that this applies only to a surety who contracted to become

liable for the payment of the *debt*, and not for the payment of the *judgment* to be entered in a particular action then pending. Its language is: "No discharge granted under this act, shall release, discharge, or affect, any person liable for the *same debt*, for or with the bankrupt, either as partner, joint contractor, indorser, security, or otherwise." This clearly contemplates a case where the security contracts to become liable with the principal for the payment of the debt.

This same act (Section 21), which under the Constitution of the United States, is, we admit, the paramount law on this subject, declares that no creditor, whose debt is provable under this act, shall be *allowed to prosecute* any suit at law or in equity, to *final judgment* against the debtor, after he is adjudged a bankrupt, until the question of his discharge has been determined.

Again, it is declared, in Section 44, that the discharge duly granted under this act shall, with the exceptions aforesaid (which do not apply in this case), release the bankrupt from all debts, claims, liabilities, and demands, which were or might have been proved against his estate in bankruptcy.

Wootten's contract, when he signed the appeal bond, was to pay the judgment that might be entered on that case. His principal was afterwards adjudged a bankrupt, and discharged as such. And the paramount law says, as the claim was provable in bankruptcy, that the principal shall be absolutely released from the debt, and that no judgment shall ever be entered in the case. Upon this state of facts, we hold that Wootten, the security on the appeal, has complied with his contract, and his liability ceases.

Judgment affirmed

ENGLISH DECISION.

The respondents, assignees of a bankrupt, brought an action against the appellants' bank to recover a sum belonging to the bankrupt, and alleged to have been in the appellants' hands at the date of adjudication of bankruptcy.

The said sum, in pursuance of an agreement between them and the bankrupt previously to adjudication, had been carried by the appellants to a special account, as security against bills not yet at maturity, drawn by the bankrupt and discounted by the appellants:

Held (reversing the judgment of the Supreme Court of China and Japan), that the action failed, since by the contract the sum claimed formed no part of the bankrupt's estate, but was rightly in the hands of the appellants at the time of the action.

Fraudulent preference, under such circumstances, could have no application to the case.

THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA *v.* EVANS AND ANOTHER.

THIS was an appeal from a judgment of Her Majesty's Supreme Court for China and Japan, pronounced on the 18th of November, 1870.

The appellants carry on the business of banking, at, among other places, Hankow. The respondents were the creditors' assignees of the estate and effects of John Mackellar and William Grant Gordon, who, under the style of "Mackellar & Co.," carried on business as merchants at Hankow, up to the end of June, 1867. Mackellar & Co. were customers of the appellants.

In July, 1867, the respondents filed a petition against the appellants to the judge of Her Majesty's Court at Hankow, whereby they as such assignees as aforesaid claimed from the appellants, as such bankers, a sum of twelve thousand taels belonging to the said firm, alleged to have been in their hands at the date of the adjudication in bankruptcy of the said firm, and to be due and payable to the respondents as such assignees.

In answer to the said petition the appellants alleged that, according to the terms of their retainer as bankers, they were bound to pay any cheque of the said firm which should be duly presented, and which should not exceed in amount the moneys of the said firm in the hands of the appellants, "applicable to the payment thereof at the time of the presentment thereof," and that at the date of the said adjudication in bankruptcy they held the sum of taels twenty-seven, two mace, and 1 candareen, so applicable; and that the said sum they had been and then were ready and willing to pay.

As to the sum of ten thousand taels, parcel of the respon-

dents' claim, the appellants answered as follows: that "The same was not payable to the said John Mackellar and William Grant Gordon, nor to the plaintiffs on demand; but was by special agreement between the defendants (appellants) and the said John Mackellar and William Grant Gordon, made previously to their said adjudication as bankrupts, specially set aside to be retained by the defendants as security for any sum which might subsequently appear due to the defendants from the said John Mackellar and William Grant Gordon, in respect of advances then previously made to them by the defendants; and the said sum of ten thousand taels was, in pursuance of such agreement and with the sanction of the said John Mackellar and William Grant Gordon, carried to a special account with them in the books of the defendants, called the 'margin bills account;' that all bills for or in respect of which the said sum of ten thousand taels was so specially set aside, as aforesaid, have not yet arrived at maturity, so that the defendants do not know what sum they are or may be entitled to deduct from the said sum of ten thousand taels; and, therefore, all things have not happened and all times have not elapsed necessary to entitle the plaintiffs (respondents) to have the said sum of ten thousand taels, or any part thereof, paid to them."

The facts were as follows:—Mackellar & Co. were in the habit of drawing bills on various persons at Shanghai against tea shipped to Shanghai. The appellants were in the habit of discounting the said bills, the shipping documents for said tea being hypothecated with them by way of security.

On the 25th of June, 1867, the appellants, there being at that time several of the bills drawn as aforesaid still running, applied to Mackellar & Co. for an additional margin of fifteen per cent. on the bills so drawn and running; and on the 27th June Mackellar & Co. paid the appellants the sum of ten thousand taels as such margin. The said sum of taels, ten thousand, was part of an advance of taels, thirty-two thousand, made earlier on the same day by the appellants to the said Mackellar & Co. against teas by them shipped to Shanghai.

The respondents gave evidence that the said payment was

made voluntarily by the firm of Mackellar & Co., and that it was made by the said firm at a time when they were in contemplation of bankruptcy.

The appellants endeavored to prove that they were ignorant that Mackellar and Co. were likely to suspend payment, and that they were justified in demanding of and receiving from the said firm the said sum of ten thousand taels, and that the said payment was made under pressure. Mackellar & Co. suspended payment on the 28th June, 1867, the day following the making of the payment aforesaid, and on the first July, 1867, were adjudicated bankrupts.

The suit was heard by the court at Hankow, when judgment was given for the appellants. From that judgment an appeal was brought to the Supreme Court of China and Japan, the learned judge of which was of opinion, first, that Mackellar & Co. were not, at the time of making the alleged agreement, relative to the said margin, indebted to the appellants, and that the appellants were not the "creditors" of the said firm; and, secondly, that the payment of the said sum of ten thousand taels was, under the circumstances, a fraudulent preference, that it was made in immediate contemplation of bankruptcy, and that it was voluntary and unjustifiable. He accordingly gave judgment for the respondents, and the decision of the court at Hankow was ordered to be reversed with costs.

From this judgment and decree the present appeal was brought.

Sir Roundell Palmer, *Q. C.*, *J. Brown*, *Q. C.*, and *Cohen* were for the appellants.

Field, *Q. C.*, *Charles*, and *Myburgh* were for the respondents.

Judgment was delivered by Lord Justice Ciffard. Their Lordships cannot entertain the slightest doubt in this case. As regards the twenty-seven taels, the respondent must have those, but this small sum cannot affect the question of costs, nor does it appear ever to have been a matter in dispute. As regards the case itself, there obviously was but one contract, and one

transaction—that is detailed in the letter to which Mr. Field referred. The letter, taken in connection with the evidence, shows distinctly that there was but one contract on the 27th June, and that that contract was an advance of thirty-two thousand taels, in this way—twenty-two thousand taels were to be advanced, and ten thousand taels were to be held as margin to secure certain debts. If those were the terms on which the advance of twenty-two thousand taels was made, and the ten thousand taels were to be retained, and if the whole was one transaction, as it clearly was, it necessarily follows that the ten thousand taels cannot be recovered so long as the state of circumstances is such as that, consistently with the contract, the ten thousand ought to be in the hands of the bank. It is clear that this was the state of things at the time when the judgment was given, and that there was then no ground whatever for proceeding for the recovery of these ten thousand taels. Fraudulent preference, therefore, can have no application whatever, because the ten thousand taels formed no part of the bankrupt's estate, and there was not in any sense a dealing with that which belonged to the bankrupt. Upon these grounds, without going further, their Lordships think it sufficient to say that the judgment of the Supreme Court was wrong, that the judgment of the court of the first instance was right, and that the appellants ought to have all their costs before the court of first instance, before the Court of Appeal, and before this court, deducting the twenty-seven taels on the assumption that this sum has not been already paid. With respects to the facts raising the question of fraudulent preference, it is unnecessary for their Lordships to express what their opinion would have been had the dealing been a dealing with the bankrupt's estate; suffice it to say that the learned judge of the Supreme Court has laid down the law more widely than it ought to have been laid down, and in a way to which their Lordships cannot assent. Their Lordships will, therefore, humbly report to Her Majesty that the judgment of the Supreme Court for China and Japan ought to be reversed with costs, and in lieu thereof that the appeal from the inferior court to the Supreme Court ought to

be dismissed with costs, and the judgment of the inferior court confirmed, deducting the twenty-seven taels, if the same has not been paid. *Judgment of Supreme Court reversed.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Debts due by a firm were purchased by a third party, partly by giving his notes indorsed by the firm. The indorsed notes were not all paid. One of the firm (it having been dissolved) files his petition in bankruptcy, and does not file the assent of any of the creditors to whom this firm is debtor on the indorsements, although he has no estate. Objections are made, that the bankrupt is liable in respect of these indorsements as principal debtor, and must, under the 33d Section, procure the assent of a majority as therein provided. That in indorsing these notes he was contracting to pay his own debt, and in any event by protest and notice became principal debtor.

Held, the taking of the notes so indorsed extinguished the original indebtedness.

That, until protest and notice, liability upon indorsement is not a provable debt.

That, although the liability of an indorser from being contingent becomes absolute and fixed, it does not thereby become the liability of a principal debtor, and does not so become until judgment has been obtained by due process of law.

That liability of an indorser, although fixed, is a secondary liability, and not a principal one.

That contingent debts and liabilities specified in Section 19 cannot be regarded as liabilities of a principal debtor within the 33d Section, until they have become fixed liabilities, other than in contradistinction to contingent. Discharge granted.

In re Loder.

Blatchford, J.—Prior to the 14th of June, 1869, Lewis B. Loder, Cyrus W. Loder, and Benjamin H. Loder, copartners under the firm name of Loder Brothers & Co., had been adjudged bankrupts by this court. On that day an order was made, discontinuing the proceedings in the matter of such bankruptcy, and directing the assignee to convey to the said bankrupts all their estate in his hands, with certain specified exceptions. On the 15th of June, 1869, the assignee made such conveyance by a proper instrument. Prior to that time, one Benjamin Loder had, at the request of the said bankrupts and by purchase, become the owner of substantially all the

claims which existed against them at the time of the commencement of such proceedings, and had agreed with them to indemnify them against the payment of all lawful claims which existed against them at such time. The said bankrupts had in their said firm name indorsed the promissory notes of Benjamin Loder for his accommodation, which notes, so indorsed, he had used in purchasing the claims which he had so purchased, and he had agreed to indemnify them against any liability on such notes. In consideration of those promises, the said bankrupts had agreed to transfer to him all the assets of their said firm. They made such transfer by an instrument executed by them on the 15th of June, 1870, and Benjamin Loder, by the same instrument, agreed to indemnify them against the payment of all claims which existed against them at the time of the commencement of the said proceedings, and against any liability on the said indorsements.

On the 28th of January, 1870, the same Benjamin H. Loder was, on a petition filed by him on the preceding day, again adjudged a bankrupt by this court. He now applies for his discharge. Numerous debts have been proved against his estate. All of such debts except one consist of the said notes of Benjamin Loder, indorsed by the said firm of Loder Brothers & Co. The one excepted debt amounts to the sum of four hundred dollars, and is due to an attorney at law for services. He has duly filed his written consent to the discharge of the bankrupt, but no other creditor has filed such consent. The contingent liability of the indorsers of the said notes on their contracts has become absolute and fixed. Objections to the discharge of the bankrupt, are filed on the ground that his assets (of which there are none) are not equal to fifty per centum of the claims proved against his estate on which he is liable as the principal debtor, and that the assent in writing of a majority in number and value of his creditors, to whom he has become liable as principal debtor, and who have proved their claims, was not filed in the case at or before the time of the hearing of the application for discharge.

It is urged on the part of the opposing creditors that the

bankrupt, although an indorser on the notes, is a principal debtor, within the meaning of the statute, to the holders of such notes; that, in indorsing the notes, the bankrupt was contracting to pay his own debt; and that, at all events, he became a principal debtor when his contingent liability became absolute and fixed.

It is established, I think, by the testimony in the case, that the indorsements made by the firm of the notes of Benjamin Loder, were contracts independent of their indebtedness to their creditors, and were made for his accommodation solely; and that such creditors, in taking the notes so indorsed, extinguished the original indebtedness of the firm, and substituted such notes for it, so that such indorsements cannot be regarded as contracts to pay the original indebtedness of the indorsers. The only question for decision is, whether the bankrupt is within the statute liable as a principal debtor in respect of such indorsements. If he is, he is not entitled to his discharge.

A sensible construction must be given to the second clause of the 33d Section of the Bankruptcy Act, as amended by the Act of July 27th, 1868.

That clause requires, as a condition precedent to a discharge in this case, the assent in writing of a majority in number and value of the creditors of the bankrupt, "to whom he shall have become liable as principal debtor, and who shall have proved their claims." The 19th Section provides, that no debts shall be proved against an estate except those specified in that section. That section provides, that a claim against a bankrupt as drawer, indorser, surety, bail, or guarantor, may be proved after his liability shall have become fixed. It cannot be proved before that time: until that time it is not regarded as a debt due and payable, or even as a debt existing, but not payable until a future day, so as to be provable under the first paragraph of the 19th Section.

Now, as a claim against an indorser cannot be proved till the contingent liability of such indorser has become fixed, it follows that if, by the fixing of such liability, the indorser becomes liable as a principal debtor, within the meaning of the

33d Section; the words in that section, "to whom he shall have become liable as principal debtor and" have no force or meaning as applicable to the liability of an indorser, and might as well have been omitted. Fixed liability makes the claim provable; otherwise it is not provable. Fixed liability makes a liability as principal debtor. The whole idea is expressed by the provability. To require the assent of a creditor who has proved his claim in respect of the fixed liability of an indorser covers the whole idea, if, by the fixing of such liability, the indorser becomes liable as a principal debtor. But if, by the fixing of such liability, and thus making the claim provable, the debtor does not necessarily become liable as a principal debtor, there is a scope for the operation of the words, "to whom he shall have become liable as principal debtor and". The same views apply to the other contingent liabilities named in the 19th Section, drawer, surety, bail, guarantor, bound for the debt of another person. There is, therefore, no soundness in the view that the fixing of the liability of an indorser makes him liable as a principal debtor within the meaning of the 33d Section, when he otherwise should not be.

Although the liability of an indorser, from being contingent, becomes absolute and fixed, it does not thereby become the liability of a principal debtor. When it is put into the shape of the judgment of a court the liability on such judgment becomes the liability of a principal debtor; but until then it is, under the 19th and 33d Sections of the act, the fixed liability of an indorser, and not the liability of a principal debtor. The maker of the note is the principal or chief or primary debtor. The indorser is the secondary debtor, liable only on the default of the maker after demand of payment, and on due notice thereof. Such default and notice fix the liability of the indorser, but it still remains the liability of an indorser. It cannot be established without showing how it became fixed, and it must thus necessarily be shown to be the liability of an indorser.

It is manifest, I think, that none of the contingent liabilities or contingent debts spoken of in the 19th Section, whether

those of drawer, indorser, surety, bail, guarantor, obligor for the debt of another person, or whatever else, can be properly regarded as liabilities of a principal debtor, within the 33d Section, until they have undergone some other change than merely becoming absolute and fixed in contradistinction of being contingent.

It follows that a discharge must be granted, notwithstanding the specifications filed, and one will be granted when the Register shall have certified conformity in the usual form.

Thorndike Saunders, for the bankrupt.

Albert Mathews, for the creditors.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where creditors' claims have been protested against, if duly proved, the creditors representing those claims will be entitled to an order according to Form No. 45, under Section 26.

In re BELDEN & HOOKER.

I, John Fitch, one of the Registers of this court, before whom the proceedings in the above entitled matter are now pending, do hereby certify that on the 16th day of June, 1870, at 12 o'clock M., personally appeared at my office, No. 44 Wall street, in the city of New York, Josiah H. Burton, assignee and creditor of the estate of said bankrupts, pursuant to an order and summons issued by me on the 10th day of June, 1870, upon the application of J. E. Burrill, attorney for Jay Cooke & Co., creditors, whose claim has been protested against. L. B. Clark appeared as counsel for the bankrupts; C. B. Stoughton as counsel for the assignee and various creditors who have duly proved their debts; J. E. Burrill as counsel for Jay Cooke & Co., and Gutman & Thomson for G. H. H. Redmond, and Rulli and Fachiri, creditors, whose claims have been protested against.

That the proceedings which took place before me on the said 16th day of June, 1870, fully appear by the stenographer's

minutes which are hereto prefixed; that copies of the respective papers requested by counsel to be certified to this court, and the statement of facts and the points presented to me by C. B. Stoughton, of counsel for assignee, and J. E. Burrill, of counsel for Jay Cooke & Co., are also hereto prefixed.

The question raised by the counsel for the creditors and assignee, C. B. Stoughton, and by the counsel for the bankrupts, L. B. Clark, is simply this: Have Jay Cooke & Co. and the other creditors whose claims have been protested against, any standing in court, their claims not having been proved in accordance with the rules and practice of this court?

I hold, as a matter of law:

First. That they have not duly proved their claims.

Second. That they are not entitled to an order, according to Form No. 45, under Section 26.

Third. That the witness is not bound to answer the questions put to him until Jay Cooke & Co., etc., etc., shall have duly proved their claim, and when such claims shall have been duly proven according to law, and when so proven, filed, and become a record of the court, then, and not till then, the question must be answered.

The proceedings of Jay Cooke & Co., etc., etc., are premature, irregular, and void. The bankrupts or any creditor may object to them.

The authorities applicable to this question are enumerated in my certificate, attached to the certificate of the proceedings which took place before me on the return day of the order, to show the cause why the said bankrupts should not be discharged, and the adjourned return day of said order, filed in the office of the clerk of this court on the 28th day of June, 1870.

All of which is respectfully submitted.

JOHN FITCH,
Register.

BLATCHFORD, J.—The claim of Jay Cooke & Co. was duly proved, and the proof of it must be filed *nunc pro tunc* as of the 23d of May, 1870.

The proof of the claim of Rulli and Fachiri ought to have had appended to it the certificate of the commissioner before whom it was taken, that it was satisfactory to him. If such certificate is procured, the proof must be filed *nunc pro tunc* as of the 1st of June, 1870, and the claim will be regarded as having been duly proved at that time.

Jay Cooke & Co. are entitled to an order according to form No. 45, under Section 26. The witness was bound to answer the questions put to him, so far as they related to any matter of examination specified in Section 26.

The clerk will certify this decision to the register, John Fitch, Esq.

UNITED STATES CIRCUIT COURT—MISSOURI.

A payment made by a debtor who is in insolvent circumstances more than four months before the filing of the petition in bankruptcy by or against him, although made to the creditor by way of preference, will be sustained as against the assignee, under the provisions of the first clause of Section 35 of the Bankrupt Act. The limitation of four and six months, in Section 35, are limitations upon payments and conveyances which are otherwise valid under the common or statute laws of the States; but where the payment or conveyance or other transaction, is fraudulent, by any other recognized rule of law, the assignee must sue within two years. In a suit by the assignee to recover of a creditor money paid by the bankrupt by way of preference, the declaration must allege that the payment was made within four months before the filing of the petition in bankruptcy or it will be bad on demurrer.

The first subdivision of Section 35 of the Bankrupt Act, with its limitation of four months, applies only to cases of payments or conveyances made to a creditor in consideration of pre-existing debts by way of preference, while the second subdivision applies to other transfers and conveyances, made contrary to the provisions and policy of the Bankrupt Act, or in fraud of the act. The provisions of Section 39 avoiding certain acts are subject to the limitations of four and six months contained in Section 35.

Bean, *Assignee of* Kintzing *v.* Brookmire & Rankin.

This case comes before us on a writ of error to the District Court for the Eastern District.

The plaintiff in error brings his suit to recover, as assignee of the bankrupt, the sum of one thousand four hundred and

thirty-six dollars, paid to the defendants within six months, but not within four months before the filing of the petition, under which the bankruptcy was established. The declaration contains two counts, intended to cover the two clauses of the 35th Section of the Bankrupt Law, in one of which the transaction is described as a payment in liquidation of an existing debt, and in the other it is alleged to have been made to defendants as creditors of the bankrupt, with intent to give a preference. In both counts the insolvency of the bankrupt at the time of the transaction is alleged, and also the knowledge or notice of said fact on the part of the defendants, and that it was within six months of the filing of the petition in bankruptcy.

Demurrers were filed to both counts by defendants, which were sustained by the District Court, and this ruling is the error assigned here.

The determination of the question here presented necessarily involves a construction of the section of the Bankrupt Law just referred to, or rather the two first clauses of it, which are in the following words:

"*And be it further enacted*, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.

"And if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing

of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or any disposition of any part of his property to any person who then had reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

And we commence the examination into the true meaning of the section in its application to the question before us by affirming what I am told was held in the same court at the last term, namely: That the two clauses differ mainly in their application to two different classes of recipients of the bankrupt's property or means. That is to say, that the first clause is limited to a creditor or person having a claim against the bankrupt, or who is under any liability for him, and who receives the money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him, and is under no liability for him. That the first clause is confined to persons of that character named cannot well be doubted, since the acts therein mentioned are acts done with persons of that character, and must be done with a view to giving such a person a preference over others of the same class. That the second clause has reference to another class of persons and is governed by other rules seems to be strongly sustained by these considerations.

First. The sale or other transfer of property mentioned in it need not be in *preference* of a creditor or person liable for the bankrupt, to render it void.

Second. It need not be made *to* a person of that character.

Third. In the first clause the transfer may still be valid, although within all other conditions of the clause, if made more than *four* months before the filing of a petition in bankruptcy, while the transfer described in the second clause requires that it shall have been made more than *six* months before the filing of the petition to have the same effect.

These are sufficient reasons to justify our conviction that the two clauses apply to transfers to two different classes of persons dealing with the bankrupt.

It is objected to this view that in the second clause "*payment*" is one of the acts described, as well as in the first, and that the word necessarily implies a transaction between debtor and creditor.

The force of this objection is fully met by the language of that part of the section which makes void the acts against which it is directed, and which, while declaring that such "sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof," omits to make any such provision as to "*payment*," while in the invalidating language of the first clause that is the first word used.

The word payment may have been used in the second clause inadvertently, or in a loose sense, to include some consideration advanced by the insolvent in some one of the transactions otherwise forbidden, but however it came to be used it is quite certain that it is intentionally omitted when the transactions are mentioned which are declared to be void.

The *payment* described in both counts of this declaration is not one covered by the second clause of the section. It is a payment of money to a creditor on account of an existing debt, and is a preference within the meaning of the law. It is clearly one of the transactions described in, and forbidden by, the first clause, and therefore not included within the second. We need therefore inquire no further concerning the relation to the latter.

In regard to the first clause both counts would be good un-

der that if they contained the averment that the transaction described took place within four months before the filing of the petition in bankruptcy. But this allegation cannot truthfully be made, and the principal question in this case is, whether this is necessary to make the count good.

The language of the section is, that if any person, being insolvent, or in contemplation of insolvency, within four months of the filing of the petition by or against him, with a view to give the creditor a preference to do any of the acts therein mentioned, the act shall be void, and the assignee may recover the property from the person receiving it, if such person had reasonable cause to believe the party insolvent. It is very certain that the act described is not made void by this clause, or by any clause in this section, unless it was done within four months of the filing of a petition by or against the bankrupt, and it is as strong an instance as can well grow out of a negative pregnant, that no such act is void for any of the causes there mentioned that was not done within the four months.

In opposition to this view of the subject, it is earnestly contended that one of the clauses of the 39th Section of the act describes pretty nearly in the same language the acts mentioned in the 35th Section, and concludes that section with the declaration that if the person doing such acts shall be declared bankrupt, the assignee may recover the property transferred contrary to the provisions of the statute, making no restriction as to time. And that the two sections can only be reconciled in this regard, by holding that the special provisions of Section 35 are to be taken as a rule of evidence not imperative but *prima facie*, that the transaction was fraudulent if within the period therein mentioned.

Having thus stated the opposite opinions of this 35th Section maintained by counsel, I do not know that I can do better than to state my own views of the policy which governed Congress in its adoption.

The acts mentioned in the sections are not such as were forbidden by the common law, or generally by the statutes of the States. Nor are they acts which in their essential nature are

immoral or dishonest. For a man who is insolvent or approaching insolvency to pay a just debt is not morally wrong, nor was it forbidden by any law in this country previous to the Bankrupt Act. And though a preference of creditors by transfer or assignment of property by an insolvent may sometimes be unjust to the other creditors, it was not forbidden by the common law, and is not forbidden by many of the States.

It is very certain that such a preference may consist with the highest obligations of morality, and under circumstances which any one can imagine, it may be the dictate of the purest justice in reference to all concerned. The careful and diligent framers of the Bankrupt Act were fully aware of all that has just been said. But they were about to frame a system of law, one main feature of which was to provide for the distribution of the property of an insolvent debtor among his creditors; and they adopted wisely, as the general and pervading rule of distribution, equality among creditors. But they found that this general principle could not, without hardship, be made of universal application; when a creditor had obtained by fair means a lien on any property of the bankrupt, that lien ought to be respected. If he had so obtained payment of the whole, or a part of his debt, the payment ought to stand. These exceptions to the general rule of distribution were, however, liable to be abused, and might be used to defeat the purposes of the Bankrupt Law. The bankrupt, knowing that he must soon be helpless, would desire to pay some favorite creditors. They, knowing his inability to pay and his liability to be called into a bankrupt court, would naturally desire to secure themselves at the expense of other creditors.

In this dilemma Congress said we cannot prescribe any rule by which a preference would be held to be morally right or wrong, and it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will, therefore, adopt a conventional rule to determine the validity of these preferences. In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that it is so when he received it, he shall run the risk

of the debtor's continuance in business for four months. If the law which requires equal distribution is not called into action for four months, the transaction, being otherwise honest, should stand; but if, by the debtor himself, or by any of his creditors, that law is invoked within four months, the transaction shall not stand, but the money or property received by the party shall become a part of the common fund for distribution.

Congress, in this view, seems also to have thought that in case of a creditor who had parted with his money or property to the insolvent party, and whose reasons for such further dealing with him were more pressing, that he might be saved from an impending loss, the time which should secure the transaction from the effect of the Bankrupt Law, should be less by two months than in the case of one who, having no such incentive to action, become a volunteer purchaser of an insolvent's property with knowledge of his insolvency.

It is in a similar spirit that the provision in Section 23, which forbids a person accepting such a preference from sharing in the assets of the bankrupt, uses the qualifying phrase "until he shall have first surrendered to the assignee all that he had received under such preference."

I do not see any necessary contradiction between Section 39 and this view of Section 35. The former section is a very long one, and recites all the acts which subject a person to involuntary bankruptcy; and that is the main purpose of the section. Among the acts which constitute a man a bankrupt, are those of giving preference to creditors in contemplation of bankruptcy. And it is, in conclusion of that section, declared in general terms, that if the debtor shall subsequently be declared a bankrupt, his assignee may recover the money or other property which was the subject of the act of bankruptcy. But this general declaration of the right of the assignee to recover, is not inconsistent with the limitation of the right in another section to cases accruing within six and four months of the commencement of the bankruptcy proceedings. The general declaration of a State statute that a person shall recover land by

an action of ejectment, is not inconsistent with the provision in the Statute of Limitations, that such actions must be brought within ten years after they have accrued. Nor is it inconsistent with the still more comprehensive right of suit conferred on the assignee by the 14th Section of the Act.

The 25th Section and the 39th Section having for the first time set up a rule by which certain payments and transfers of property shall be declared void, a rule at variance with common law and with the statutes of the State, very properly limits and defines the circumstances within which this new rule should operate. These are, among others, that the recipients of the bankrupt's money or property must have had reasonable cause to believe he was insolvent, and that the transaction must have been recent when the Bankrupt Law was applied to the case of a creditor within four months, and with the general purchaser within six months.

As to all illegal and fraudulent transactions which are so by common law, by statute law, or by any other recognized rule of law, other than these special provisions of the Bankrupt Law, that act has imposed the limitation of two years on the assignee in bringing his suit, and by that they are governed. But the case made by plaintiff does not come within any such law known to us. Therefore his declaration is bad, and the demurrer was properly sustained by the District Court, whose judgment is affirmed.

UNITED STATES CIRCUIT COURT—MISSOURI.

Under the statutes of Missouri, in force prior to March 1, 1864, a homestead to the value of one thousand dollars, when owned by the head of a family, was exempt from execution. The exemption applied to an estate for years, when owned by the defendant in execution, and such an estate, when sold by the assignee in bankruptcy, is subject to the exemption, and the assignee will be ordered to pay over the sum of one thousand dollars to the bankrupt where the leasehold estate sells for more than that amount.

In re Beckerkord.

The provisions of Section 14 of the Bankrupt Act, adopting the exemptions in favor of execution debtors established by the laws of the several States, does not destroy the uniformity of the Bankrupt Act, nor violate any provisions of the Federal Constitution.

In re BECKERKORD.

MILLER and KREKEL, J. J.—At the time Beckerkord was declared a bankrupt he was the owner of an unexpired term of a leasehold estate, having yet five years to run. The value thereof, as appears from a sale made by the assignees, was one thousand four hundred and ninety dollars. After the sale the bankrupt, by his counsel, appeared before the Register having the matter in charge, and claimed one thousand dollars of the proceeds of the sale, in lieu of a homestead, which claim was resisted by assignees. The Register thereupon certified the case to the District Court of the Eastern District, and the judge, on the hearing thereof, allowed the claim, and ordered the amount to be paid by the assignees. From this order an appeal was taken, and the case thus brought before us. It is admitted that the bankrupt is the head of a family. The 14th Section of the Bankrupt Law, after excepting certain specified articles, goes on to exempt "such other property as now is, or hereafter shall be exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year 1864." The laws in Missouri in 1864 exempted among other property from sale under execution or other process, "when owned by the head of a family or wife, who shall be a *bona fide* resident of the State, any of his or her real estate, not exceeding one hundred and sixty acres of farming land, or one lot in town or city, in value one thousand dollars, at the date of such exemption, to be held and enjoyed by such party as a homestead." After providing for setting apart of home-

stead, and ascertaining the value thereof, the law proceeds to enact that "when the real estate owned by the head of a family is of greater value than the amount allowed as the value of a homestead, and is not susceptible of division, such real estate may be sold, and the officer shall pay over to the defendant in such execution the amount of a homestead exempted under the provision of the act." The act has the provision usual in such laws making it inapplicable to liabilities contracted before the taking effect thereof.

Two questions are suggested for our consideration. First, can a homestead be carved out of a leasehold estate, and if so, secondly, is that part of the 14th Section of the Bankrupt Law making the exemption, constitutional.

The language of the Missouri statute in reference to the title is, that he or she must be owner of the real estate, in order to have a homestead exempted. It is argued that there can be no such ownership as the law here contemplates in a leasehold estate, and hence no homestead can be carved out of it. By the 17th Section of the Missouri statutes, relating to executions, it is found that leases upon land for any unexpired term of three years and more, shall be subject to execution, and sold as real property.

The term real property is defined by the 38th Section of the general provisions of the same statute, as including every estate, interest, and right in land. These provisions seem to us to solve the question suggested, in favor of the bankrupt, entitling him to have a homestead set apart in the leasehold owned by him at the time he was declared a bankrupt.

The second question presented and urged with earnestness is the unconstitutionality of that part of Section 14th of the Bankrupt Law, making the homestead exemption.

"Congress shall have power to establish uniform laws on the subject of bankruptcy throughout the United States," is the language of the Constitution by which the grant is made. It is insisted that the 14th Section, already cited, having adopted the exemption laws of the State in which the bankrupt is domiciled, and these exemptions having no regard to uniform-

ity, violate the constitutional provision authorizing uniform laws throughout the United States to be passed. It is obvious from the language employed, that the uniformity here referred to was a uniformity among the States. If Congress saw cause to pass bankrupt laws under the grant of power referred to, the injunction is, that they shall be uniform throughout the United States. So far as the distribution of the bankrupt's assets—the point under consideration—is concerned, the law is uniform. When viewed with reference to the State exemption laws, there is a uniformity which, on reflection, readily suggests itself. Though the States vary in the extent of their exemptions, yet what remains the Bankrupt Law distributes equally among the creditors. Nor does the Bankrupt Law in any way vary or change the rights of the parties. All contracts are made with reference to existing laws, and no creditor could recover more from his debtor under the State laws than the unexempted part of his assets, the very thing that is attained by the Bankrupt Law, which, therefore, is strictly uniform.

To establish the uniformity contended for would have made it necessary for Congress to have virtually abrogated all State exemption laws. In doing so it would necessarily have legislated against the debtor class, by making whatever property that was exempt at the time of contraction subject to distribution. This certainly would not have tended either to uniformity, justice, or equality. But the power to abrogate State exemption laws has never been claimed for Congress, but on the contrary, such laws have been upheld and declared constitutional, when not applied to obligations prior to the passage of the law. The idea of property in men has grown gradually weaker, and since the abolishment of imprisonment for debt, has nearly vanished.

In lieu thereof, the State for its own purposes and the well-being of the individual and family, have secured what are deemed necessaries against the claims of creditors, and directed the latter to look to the integrity and property of his debtor for security.

Exemption laws now exist in all the States, and are deservedly becoming more and more popular. There is something so humane underlying them, that courts will not interfere unless they violate a plain mandate of the organic law.

We find nothing in the provisions of the Bankrupt Law which we are now considering, that is in violation of the Constitution of the United States. We are of opinion that the order of the District Court setting apart the sum of one thousand dollars in lieu of a homestead, was correct, and adjudge that the same be in all things affirmed.

UNITED STATES CIRCUIT COURT—MARYLAND.

On the 19th of April, 1867, Gover, Hardesty & Co., of Baltimore, failed in business, and closed their banking-house, owing the appellant Street, as trustee, a large sum—balance on deposit account. The partners of the banking-house, it is admitted, regarded this deposit indebtedness as entitled to special preference in payment of debts.

The bank had to their credit, at the time of their failure, two thousand nine hundred dollars in New York. This sum was on the 22d of April attached by the appellant, in a proceeding in the courts of that city, based on a confession of judgment by Gover, one of the partners of the Baltimore Bank, then in New York, and judgment was obtained on the attachment in favor of Street.

On the 20th of April, Hardesty, the other partner, in Baltimore, drew on the New York funds in favor of George H. Williams, attorney for Cohen. A controversy thus sprung up in the New York courts between these opposing creditors, in which the appellant Street prevailed and obtained judgment.

Within four months afterwards, Gover & Hardesty were adjudged bankrupts.

In a suit brought by Dawson, assignee in bankruptcy, against Street, to recover back this money, *held*, that the plaintiff was entitled to recover; and judgment of the District Court to that effect is, on appeal, now affirmed.

STREET *v.* DAWSON, *assignee of* GOVER, HARDESTY & Co.

THIS was an action of *assumpsit* in the District Court.

The case was substantially as follows: Gover, Hardesty & Co. were bankers in the city of Baltimore. J. M. Street, as trustee for the heirs of St. Clare, deposited with them certain

sums of money amounting in the aggregate to three thousand four hundred dollars. The last of these deposits was made on the 12th of October, 1866. On the 19th of April, 1867, Gover, Hardesty & Co. failed in business and closed their banking house. At that time the deposit of Street, as trustee, had been reduced to three thousand one hundred dollars. Both of the partners regarded this deposit as made under peculiar circumstances, and enttiled to special preference in payment.

At the time of the failure, Gover, Hardesty & Co., had a balance in their favor of two thousand nine hundred dollars and thirty-nine cents, in the hands of Scott, Capron & Co., of New York. To secure the transfer of this balance to Street in payment of the trust deposit, Gover and Street proceeded together to New York on the evening of the 21st of April. Upon arrival, they called upon Scott, Capron & Co., and found that telegrams had been received by them from Hardesty and from George H. Williams, prohibiting the payment of the money.

It appears that, on the 20th of April, Hardesty had drawn drafts in the name of the firm, upon Scott, Capron & Co. for the balance in their hands, in favor of George H. Williams, who was attorney for Lewin M. Cohen. The balance in favor of Cohen seems to have accrued from the sales of stock belonging to him, and sold for his account by Gover, Hardesty & Co., through Scott, Capron & Co.

Under these conflicting assignments, a controversy sprung up in New York. A suit was commenced by Street against Gover, Hardesty & Co., and judgment obtained, by consent of Gover, on the 22d of April, and proceedings were instituted to subject the balance in the hands of Scott, Capron & Co. to the payment of this judgment. In the course of these proceedings, the claim of Cohen was set up. After a protracted contest, an order was made for the payment of the money to Street; a large percentage was absorbed by costs and attorneys' fees; the sum only of two thousand four hundred and twenty-three dollars and twenty-seven cents came to his hands.

Within four months after the judgment, Gover & Hardesty were adjudged bankrupts.

The object of the suit in the District Court was to compel Street to refund the money to the assignee in bankruptcy of Gover, Hardesty & Co.

Upon the trial, various instructions were asked, all of which were refused by the judge, who, however, gave the following instruction to the jury: "If the jury shall find from the evidence in this case that the firm of Gover, Hardesty & Co. was insolvent, and closed their banking-house on the 19th of April, 1867, and that George P. Gover, one of said firm, went on to New York in company with the defendant, on the 21st of said month, and on the next day defendant brought suit in said city against said firm, for the money due him by said firm; in which suit the said George P. Gover, without the knowledge and consent of his partner, and with intent to give a preference to said defendant, confessed the judgment on the day of the institution of said suit, upon which judgment, execution by attachment issued, and the funds of said firm in said city were attached, and condemned, and paid over to the defendant,

"And if the jury shall further find that when said suit was brought, judgment confessed, and money received, the defendant had reasonable cause to believe that the said firm was insolvent, and that such confession of judgment was made in fraud of the provisions of the Bankrupt Act,

"And, if the jury shall further find, that within four months from the confession of said judgment, and before the institution of this suit, the said Gover, Hardesty & Co. had been adjudged bankrupts by a decree of this court, and that the said plaintiff had been duly chosen assignee of said bankrupts, and had accepted said trust, and that his selection as assignee had been duly approved by this court; then the jury shall render their verdict for the plaintiff for the amount received under said attachment by the defendant, or by his attorney, with such interest as the jury may think proper to allow, not to exceed six per centum on the amount received."

This instruction was clearly correct, and it covered, either by

affirmation or negation, the whole ground of the instructions asked. There was, therefore, no error in the instructions given.

Upon one point only could any doubt be entertained. The amount which actually came into the hands of Street was only two thousand four hundred and twenty-three dollars and twenty-seven cents, and it is doubtless a hardship that he should be compelled to refund what seemingly he never received. But under the 35th Section of the Bankrupt Act, there can be no doubt that the transaction, through which he attempted to obtain possession of the balance in the hands of Scott, Capron & Co., was void as against the assignee in bankruptcy, and that the assignee was entitled to the full amount of that balance. Having notice of the insolvency of Gover, Hardesty & Co., Mr. Street intervened at his peril, and in a legal sense, it must be agreed that the whole amount came to him, and that the sum which was appropriated to the costs and attorneys must be considered as having been paid by him after it was received under the order of the court.

The judgment of the District Court, therefore, must be affirmed.

Wm. Schley, Esq., for appellant.

Geo. H. Williams, Esq., for appellee.

SUPERIOR COURT—NEW YORK.

1. Proceedings in an action in a State court will not be stayed simply on the ground that the plaintiffs have taken proceedings to have defendants declared involuntary bankrupts.
2. In such case an order of the Court of Bankruptcy, adjudging the defendants bankrupts, must be made before they are entitled to a stay of proceedings in the State court.

MAXWELL *et al. v.* FAXTON *et al.*

JONES, J.—Section 21 of the Bankrupt Act has no application until the party has been adjudged a bankrupt.

In case of voluntary bankruptcy, the law adjudges the petitioner a bankrupt immediately on the filing of the petition, and a warrant against his property immediately issues (Section 11); therefore, in such cases, Section 24 applies the moment a proper petition is filed.

But in cases of involuntary bankruptcy, an order of the Court of Bankruptcy is necessary to adjudge the party proceeded against a bankrupt, and a warrant cannot issue against his property until such an order has been made. (Section 42.) Therefore Section 21 does not apply until such an order has been made.

The defendants seek to have plaintiffs' proceedings in this action stayed, because they have taken proceedings to have them declared involuntary bankrupts. The defendants are contesting the bankruptcy proceedings instituted by the plaintiffs, and no order has yet been made adjudging them bankrupts. Section 21 consequently does not apply.

Motion denied, with ten dollars costs.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Under Section 43, the court may authorize the trustees to carry on the business of the bankrupt as if there had been no failure; and may allow formal proof of debt to be dispensed with, where the correctness is admitted.

In re DARBY.

TREAT, J.—Under Section 43, the trustees, under direction of the committee, may, if so ordered by the court, proceed to settle the estate just as if there had been no adjudication of bankruptcy and the bankrupt was managing his own affairs, taking care always to secure legal protection to each of the creditors. If, under such a general order, the interposition of the court is needed for the examination of witnesses under oath, etc., application therefor may be made to the judge, or Register; and if made by the judge, he, on granting the same, will order the examination to be had before the Register, or

otherwise. In other words, wherever the trustees and committee are satisfied that demands are correct, and need no testimony to be taken, they can allow the same. When they are not satisfied, the demand should be proved before the Register on notice to the trustees.

UNITED STATES SUPREME COURT.

Where an appellant in this court becomes bankrupt after his appeal taken, his assignee in bankruptcy, upon the production of the deed of assignment of the Register in Bankruptcy, duly certified by the clerk of the proper court, may, on motion, be substituted as appellant in the case.

HERNDON *v.* HOWARD.

IN this case Herndon had taken an appeal from the Circuit Court for the Western District of Texas; and after doing so had become bankrupt. His assignee in bankruptcy, one Masterson, now moved to be admitted as a party appellant in the cause, with the original appellant, Herndon.

His motion was supported by the production of the deed of assignment of the Register in bankruptcy of the District Court of the United States for the Eastern District of Texas, in the matter of his bankruptcy to Masterson, duly attested by the clerk of the court. The motion was founded upon the 14th Section of the Bankrupt Law, which provides that the assignee in bankruptcy may prosecute and defend in his own name all suits at law and in equity pending at the time of adjudication of bankruptcy, in which the bankrupt is a party, in the same manner and with the like effect as they might have been prosecuted or defended by the bankrupt; and which makes a copy of the Register's assignment, duly certified by the clerk of the proper court, conclusive evidence of the right of the assignee to sue.

The Chief Justice delivered the opinion of the court.

The section of the Bankrupt Law relied on, we think, governs the present case. It seems to require that Masterson, the

assignee, be substituted as appellant for Herndon, the bankrupt, who may be said to be *civiliter mortuus*, precisely as an executor or administrator would be made party instead of an appellant actually deceased; and an order will be made accordingly. 9 Wallace, 664.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A person who prepares for market and sells lumber, which is the growth of his own land, is a manufacturer within the meaning of the Bankrupt Act as amended by the Act of July, 1870.

The words, commercial paper, in the 39th Section of the Bankrupt Act, include not merely paper given by a merchant in the direct course of his business, but all paper governed by the rules which have their origin in and are founded upon the custom of merchants.

In re CHANDLER.

LOWELL, J.—This petition *in invitum* has been heard partly on an agreed statement of facts, and partly on supplementary evidence, introduced at the trial, by consent.

The defendant has been for many years a member of the bar, but of late has not pursued the practice of his profession to a large extent. He has lately held the important office of Assistant-Treasurer of the United States, at Boston; and since retiring from that post, has been employed in his own private affairs. The only business at all approaching trade in which he has been engaged is in preparing for market, through his agents, boards and shingles, made at his saw-mill in or near Malone, in the State of New York, and selling the same by himself and others; which he has done on a considerable scale, and as one of his chief sources of revenue. He owns a large tract of woodland there, and nearly all the lumber sawed and prepared at his mill is the growth of his own land. He is liable on a large number of negotiable promissory notes, made by Horatio Woodman, and indorsed by him, for the accommodation of said Woodman; and on a less number and amount of notes, made by himself and indorsed by Mr. Woodman, for

his accommodation. None of these notes have any connection with the lumber business. The petitioner holds one of the Woodman notes, indorsed by Mr. Chandler, and on which his liability has been duly fixed, and which has been dishonored for more than fourteen days. It was bought, for value, before maturity.

By the Bankrupt Act, as amended by Statute 14, July, 1870, 16 Statutes, 276, any person is liable to be adjudged a bankrupt, who being a banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days. It has been ably and strenuously urged on the one part, and denied on the other, that Mr. Chandler is either a trader or manufacturer; and that by the non-payment of the note, held by the petitioner, he has suspended and not resumed payment of his commercial paper.

The definition of a trader has been a matter of some difficulty; but I am inclined to agree with the argument for the defense, that a person must buy as well as sell, to come within the scope, and that one who merely makes up the product of his own land is not to be included. But this rather strengthens the second position of the petitioner, that such a person may be a manufacturer, because it shows a reason for the recent amendment by which manufacturers were added to the traders, etc., in the statute. A person who works up lumber, appears to be a manufacturer of lumber; and such lumber is spoken of in the tariff acts, regulations of the Treasury Department, and in the late treaty of reciprocity with the British Provinces, as manufactured lumber, and is understood to be so designated in common speech. If so, the fact that the manufacturer buys the land as well as the trees, does not appear to be material. It is not like the case put in argument, of a farmer making cider or cheese, for two reasons. These products, when made by the farmer exclusively from his own farm, are not usually made on so large a scale as to be called a manufacture, as the word is now commonly used; and the making is one merely incidental to the cultivation of his land, like curing his hay, etc.

But in the case of lumber, the land may be almost said to be incidental to the lumber, which usually forms its chief value, and the manufacture itself is the main source of profit, independently of any cultivation or other use of the land. In this respect the business of a manufacturer seems more analogous to that of a miner, who is made subject to the act; and as to whom it would hardly be contended that the ownership of the land was material.

If, then, the defendant is a manufacturer, has he suspended payment of his commercial paper? Upon this point, I am referred to two cases in the Southern District of New York, *in re* Lowenstein, 2 N. B. R., 306, *in re* The McDermott Patent Bolt Manufacturing Co., 3 N. B. R., 128, in which Judge Blatchford ruled that the paper mentioned in the statute is such as is given by a merchant or trader in the direct course of his business, and not for a mere loan of money, though the money may have been used in his business, and still less for any dealing outside of his trade. Some cases that were not cited are of a different tenor. *In re* Heinsheimer, 3 N. B. R., 174; *in re* Nickodemus, 3 N. B. R., 230; *in re* Hollis, 3 N. B. R., 310. In these cases the term commercial paper is said to be descriptive of a certain sort of contract or security. Thus, in Nickodemus' case, Judge Withey expresses the opinion that it refers to bills of exchange, promissory notes, and negotiable bank checks, paper governed by the rules which have their origin and are established upon the custom of merchants. "Such paper," he says, "is usually denominated commercial paper, and we must presume Congress used the term in its common acceptation, rather than in a more restricted case." Similar opinions are given in the other cases cited. Judge Withey finds support for this construction in the fact that bankers, who are not engaged in commerce, strictly so called, are within the act, and that view is much strengthened by the amendment, which adds brokers, manufacturers, and miners to the persons the dishonor of whose obligations is an act of bankruptcy.

It is of the utmost consequence to preserve the uniformity

which the Constitution and the law intend should be established in this important branch of commercial jurisprudence, and this uniformity will in so far fail to be attained, as the statute is differently construed by different tribunals. In this case, however, since I find the diversity already existing, I must choose between the opposing views; and after the most careful deliberation I consider the more enlarged construction used the true one. Bills of exchange have their origin and derive their peculiar properties from the custom of merchants. Thomas Malynes, merchant, writing in 1629, before promissory notes had come into use in England, thus quaintly expresses himself: "The nature of a bill of exchange is so noble, and excelling all other dealings between merchants, that the proceedings therein are extraordinary and singular, and not subject to any prescription by law or otherwise; but merely subsisting of a reverend custom used and solemnized concerning the same." Lex. Marcatoria, Part 3, C. 5. And he explains at great length how different the rights and duties of the parties to such a contract are from those arising under any contract known to the common law of England. It is a familiar learning that the mode of declaring on a bill of exchange was, that it had become due and payable to the plaintiff according to the custom of merchants, and this was a necessary allegation. When notes of hand became common, similar declarations were framed upon them, but the courts refused to admit the validity of a custom to pay a note to the indorsee, without an express promise to that effect, because, they said, it would tend to defraud the promisor, who might have already paid the note to a former holder; and they denied to the holder the right to sue according to that custom of merchants. *Clerke* v. *Martin*, 2 Ld. Raymond, 757. Immediately after this last decision, the statute 2 and 3 Anne, C. 9, afterwards made perpetual, was passed, which recited the fact of such a decision, and proceeded, "for the encouragement of trade," to place negotiable notes for the payment of money upon the same footing as inland bills of exchange, and declared that they should be assignable to and suable by the holder *according to the custom of*

merchants. This phrase is used repeatedly throughout the act. This statute has been copied in many of our States, and adopted in others as part of their common law. Story on Notes, Section 6 and note 2. 3 Kent Com., 72, and note *a.*

Such negotiable paper, therefore, stands by usage and by statute upon the custom of merchants, and is controlled and regulated by such custom. And these regulations are always treated as part of the law merchant. In saying that any person belonging to one of certain designated classes should be deemed a bankrupt if he failed to pay his commercial paper, it seems to me that Congress simply referred to a well-known and very conclusive test of insolvency. If a trader allows his paper to go to protest, he is said to have failed or suspended. The expressions are used as equivalent. It is like the closing of the counting-room and denying one's self to creditors, of the old English law, and it will be observed that while Congress has not thought fit to say that every insolvent person may be made bankrupt against his will, yet any one who has shown by certain conclusive acts or neglects, like avoiding process, buying in person, and suffering his paper to remain dishonored, that he cannot hope to pay his debts, may be proceeded against. In this point of view it makes no difference, in reason, that the particular note which is dishonored was not given in the regular course of the business of the promisor; the obligation to pay and the inference from neglect are equally stringent. In the Bankrupt Court we have occasion to know that accommodation notes are often so made as to simulate notes given for merchandise, because the latter command a higher price in the market; but the rights of the *bona fide* holder are precisely the same in both cases. It seems more just and reasonable to conclude that Congress intended simply to designate a certain kind of promise, well known to and governed by the law merchant, and not to give a peculiar sanctity to such as happens between the first parties to it to have originated in a particular way, thus instituting an inquiry which appears wholly immaterial to the purpose in hand, and not admissible in any other form of action, and unjust to the holder

of the paper. It is as if the law had enumerated the various kinds of promise, instead of designating them by a comprehensive term which Judge Withey says is commonly used to designate such paper. While, therefore, I agree with the defendant that commercial means mercantile, and that mercantile means pertaining to trade, yet I can by no means adopt the conclusion that the particular bill or note must be in any way connected with commerce or trade, but rather that it must be of that class which commerce introduced and still deals in.

If Congress had said that when a merchant, etc., had stopped payment, he should be declared bankrupt, unnecessary litigation might have arisen out of the non-payment of open accounts, which are much used, of late years, between wholesale dealers and their customers in trade, and they therefore fixed upon that kind of promise which is payable on a day certain, and the dishonor of which is a sure test of insolvency. The defendant testified to his understanding that "commercial paper" was used in State street in contradistinction to "accommodation paper." Judge Withey, on the other hand, in the passage already twice cited, says the phrase is commonly used to mean such paper as comes within the purview of the law merchant. No doubt a distinction is made in the market between these classes of notes or bills, but I do not profess to be acquainted with or to have been shown any usage so general throughout the country as to enable me to construe the phrase used in the statute as a term of art intended to distinguish between these two classes or as having any other technical meaning. In the books on trade the term used is "*real bills*" to designate those given in a genuine transaction between dealers, and I have heard the expression "business paper" applied in the same way. But I am not satisfied that the phrase in the statute is intended to have that meaning, or that in fact, has it, according to any wide-spread usage. It seems improbable, because such paper is equally sacred in the hands of the *bona fide* holder, and the failure to pay it is just as sure a test of insolvency; and an inquiry into the origin of such contracts is never admissible for any purpose or in any court

in a suit by such a holder. If there is any defense which affects the holder, the remedy is ample, because the failure to pay such a note would not be a suspension of payment, but beyond that the inquiry would be unreasonable and embarrassing, and would oftener give advantage to a defendant whose dealings have been somewhat irregular and unusual, which I do not believe the statute intended to give. Many, perhaps most, of those traders who are obliged to suspend payment, have been injured by speculations beyond the legitimate time of their trade, but their failure is equally certain, and the rights of all classes of their creditors are the same as if they had continued to deal in the course most familiar to them. One of the judges has intimated, though it was not necessary for him to decide, that accommodation paper might perhaps be excluded by the word *his* of the statute. But upon further reflection I think it would appear to him, as it does to me, that *his* commercial paper, as applied to one proceeded against in bankruptcy, merely means paper which *he* is bound to pay, without reference to its origin. If a banker, etc., has indorsed a note, the indorsement is *his*, and if he has received due notice of dishonor, *he* is liable to pay the note; and if he has thereafter failed to pay it the failure is *his;* and this although some one else, who was bound to save him harmless, has failed to do so, and thus has broken two promises, while the indorser has broken but one. The one is sufficient to establish his failure to meet his obligations.

I must therefore hold that the act of bankruptcy alleged in the petition is proved. It is a great satisfaction to me to know that this decision can be reviewed in the Circuit Court, and I hope the respondent will take the necessary steps to that end. A recent rule of the Circuit Court points out the time and manner of applying to the general supervisory power of that court.

Petition sustained. Defendant adjudged bankrupt. Warrant not to issue for ten days, unless appeal is waived.

H. D. Hyde, for petitioner.

G. S. Hillard, for respondent.

WARREN CIRCUIT COURT—KENTUCKY.

Where an amended answer set up a discharge in bankruptcy, and objection was made on the ground that claimants' names had been omitted from the bankrupt's schedules of creditors,

Held, the discharge in bankruptcy was sufficiently pleaded, and it was admitted to be genuine by replication. The mere omission of the name of a creditor on the schedule of a bankrupt is not a substantive ground for preventing or avoiding the discharge of the bankrupt as to such creditor, unless the omission was willful or fraudulent.

PAYNE & BROTHER *v.* ABLE AND OTHERS.

LINDSAY, J.—In July, 1868, Payne & Brother brought several suits in equity, in the Warren Circuit Court, against Able and others, for large sums of money, and had attachments issued, in each case, against said Able's property. Two of the attachments were discharged by bonds, according to Section 242 of the civil code, and in one of them a forthcoming bond was given under Section 235 of the code. The various defendants filed their answers, and the suits were consolidated; but, on the 8th of August, 1869, Able filed an amended answer, setting up his discharge in bankruptcy, obtained in June, 1869, which released him from all debts and claims existing on the 22d October, 1868. Payne & Brother replied to this amended answer, charging that their names had not been placed upon his schedule of creditors by Able in the Bankrupt Court; that their claims had not been there, and hence that the discharge in bankruptcy presented no bar to the recovery in the actions.

In this condition the consolidated causes were heard, and the Circuit Court dismissed Payne & Brother's petitions, and overruled a motion to require the sureties on the attachment bonds to pay them as much as Able was indebted to them.

Held, the discharge in bankruptcy was sufficiently pleaded, and it was admitted to be genuine by the replication. The mere omission of the name of a creditor on the schedule of a bankrupt, is not a substantive ground for preventing or avoiding the discharge of the bankrupt as to such creditor, unless the omission was willful and fraudulent. (8 Metcalf, 79; 1 Rich-

ardson, 374.) Under the present Bankrupt Law, the discharge of a bankrupt can only be set aside by direct proceedings, on the ground that it was fraudulently obtained. The replication of Payne & Brother does not charge Able with any fraud in the omission of their names, and, since their claims were provable under the Bankrupt Act, Able's discharge released him from all personal liability to them.

The court below properly refused the rule against the sureties on the attachment bonds. The sureties were never liable for the debts themselves, and did not contract to pay the same or any portion of them, but merely to perform the judgment of the court; and no judgments were, or could have been, rendered against Able. Therefore the sureties were not liable for the debts. The court, however, erred in dismissing the petition as to all the defendants. The discharge of Able did not relieve Allen of the indebtedness of Able & Allen to appellants. The discharge of Able from personal liability does not prevent appellants from enforcing their liens upon the property fraudulently conveyed by Allen & Able to his mother-in-law. For this reason only, the judgment is reversed.

UNITED STATES CIRCUIT COURT—IOWA.

1. Where an assignee brings his action under the 35th Section of the Bankrupt Act, to recover of a creditor of the bankrupt property alleged to have been sold or conveyed to him in fraud of the act, and where the defendant in such action denies his liability, resists a recovery, goes to trial, and judgment passes against him, such a judgment conclusively establishes that the creditor sought to obtain a fraudulent preference, and disentitles him to prove up against the estate of the bankrupt the debt or claim on account of which he received the fraudulent preference. Payment of such a judgment upon execution issued, is not such a *surrender* as is contemplated by Section 23 of the act, and will not enable the party to prove up the claim in satisfaction of which he received property from the bankrupt by way of illegal preference.
2. Sections 23 and 39 of the Bankrupt Act commented on, and construed to stand together.
3. Where the debt or claim on account of which the illegal preference is received is single and entire, the creditor is entitled to no dividends thereon, though it may have been proved up or allowed before the judgment was obtained which established the fraudulent character of the

preference; but if he has two disconnected debts, receiving a fraudulent preference as to one only will not affect his right to prove up the other, or to receive dividends thereon.

4. An open running account for merchandise sold, consisting of various items of charges and credits at different times, on which was credited the amount at which property was purchased by way of fraudulent preference, leaving a balance which was proved up before the Register against the bankrupt's estate, was held, *prima facie*, to be but a single debt or claim, and, by reason of such preference, disentitled to any dividend on any part thereof.

In re Richter's Estate.

The following are the facts as they appear from the evidence in this case:

Richter was adjudged a bankrupt on his own petition, filed on the 19th day of October, 1868. Cragin is the assignee in bankruptcy. The present controversy is between the assignee and Messrs. Greenwald & Co., who are by far the largest creditors of the bankrupt, and to whom the latter, *three days* before filing his petition to be adjudicated a bankrupt, sold and transferred his stock of goods, which embraced, as appears from the inventory, nearly all his property not exempt from execution. Greenwald & Co. filed their claim before the Register, to be proved against the estate. It consists of a running account for goods and merchandise sold by them, they being merchants, at various times during the years 1867 and 1868, to the bankrupt, who was also a merchant.

The total debit side of the account is:—

		$5,984 62
Various credits		2,983 10
Balance		$3,001 52
Oct. 16, 1868. By merchandise		1,471 88
Balance		$1,529 64

Accompanying this account filed with the Register was the following statement, sworn to by Greenwald & Co., to wit: "Richter owed us for goods sold three thousand and one dollars and fifty-two cents; but on the 16th day of October, 1868, he sold and delivered to us the stock of goods belonging to him for one thousand four hundred and seventy-one dollars and eighty-eight cents, leaving balance due us one thousand five

hundred and twenty-nine dollars and sixty-four cents." Their debt was proved up and allowed against the estate, in this amount, viz.: one thousand five hundred and twenty-nine dollars and sixty-four cents, and constitutes nearly one-half of all the claims established against it. Subsequently, in April, 1869, the assignee commenced an action against said Greenwald & Co., in the District Court of the United States for the District of Iowa, to recover the value of the stock of goods which Greenwald & Co. had thus purchased of the bankrupt.

The petition in said action, in substance, alleges that Richter was adjudged a bankrupt on his own petition, October 19th, 1868; that Cragin was appointed assignee, November 21, 1868; that on the 16th day of October, 1868, Greenwald & Co., defendants, claiming to be creditors of Richter, took and received from him a transfer of a large amount of goods, being his whole stock in trade as a retail merchant, of the value of three thousand five hundred dollars, the said transfer being made out of the ordinary course of business, and with a view to prevent said property from being distributed to the creditors of the bankrupt, and to evade the Bankrupt Act; the said Greenwald & Co. having, as alleged, at the time of receiving such transfer, reasonable cause to believe the said Richter to be insolvent. The petition further alleges want of assets to pay debts proved; a demand for the goods of G. & Co.; their neglect and refusal to surrender them, whereby they have converted them to their own use; wherefore the assignee prays a judgment for their value.

Greenwald & Co. filed an answer denying the allegations of the petition. At the November term, 1869, of the District Court, a trial of this action on these issues was had, resulting in a verdict and judgment for the assignee against Greenwald & Co., for one thousand five hundred and sixty-six dollars and thirty-one cents, which judgment was never set aside or reversed. Execution was immediately issued, and on the same day the marshal made return thereon that he had received the full amount thereof from Greenwald & Co. After this judgment was rendered, and at the same term, Greenwald & Co.

made, in the District Court, a motion as follows: "Now come the said Greenwald & Co., and the court having found that the goods of the said Richter were taken by them for the benefit of all his creditors, move the court *for leave to prove up the balance of their claims, viz.*, one thousand four hundred and seventy-one dollars and eighty-eight cents, being the amount credited to said Richter, October 16, 1868, when said goods were obtained.

This motion was overruled by the District Court, and from its judgment thereon, denying to Greenwald & Co. the right to establish the balance of their debt, an appeal is taken by them to this court.

After the aforementioned judgment was rendered in favor of the assignee against Greenwald & Co., for the value of the goods, the assignee, by his counsel, moved the District Court "for an order vacating and setting aside the allowance heretofore made of the claim of Greenwald & Co. against the estate of said bankrupt, and directing the assignee not to pay over any dividend to them on the claim proved by them."

This motion is based upon the legal effect of the said judgment in favor of the assignee against Greenwald & Co., which conclusively establishes, as the motion claims, that the latter sought to obtain an illegal preference in fraud of the Bankrupt Act. The District Court sustained this motion, and made an order declaring that Greenwald & Co. were not entitled to any dividend or share in the bankrupt's estate upon the debt theretofore proven against it, and directing the assignee not to pay them any dividend thereon. From this order the said Greenwald & Co. also appeal.

Certain sections of the Bankrupt Act of March 2, 1867, having relation to the question before the court, may now be mentioned. (14 Stats. at Large, 517.)

By Section 18 of this statute it is provided that "No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee."

By Section 23 it is enacted that "*Any person who*, after the approval of this act, *shall have accepted any preference*, having

reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, *shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.*"

By Section 29 it is provided that "No discharge shall be granted, or if granted shall be valid, if the bankrupt has given any fraudulent preference contrary to the provisions of this act * * * or if he has, in contemplation of becoming a bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor, etc., * * * * or has been guilty of any fraud whatever, contrary to the true intent of this act."

Section 35 relates to transfers in fraud of the act, and as to fraudulent preferences is as follows: "If any person, being insolvent, or in contemplation of insolvency, within four months * * * with a view to give a preference to any creditor * * * makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment * * * transfer, or conveyance, or to be benefited thereby * * * having reasonable cause to believe such person insolvent, and that such payment, * * * assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it or to be benefited * * * And if such sale, etc., is not made in the usual and ordinary course of business of the debtor, the act shall be *prima facie* evidence of fraud."

Section 39, relating to involuntary bankruptcy, makes such fraudulent preference by a bankrupt or insolvent debtor, an act of bankruptcy, and then (as amended, July 27, 1868), enacts as follows: "And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid

* * * assigned, or transferred contrary to this act. *Provided* the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent, *and such creditor shall not be allowed to prove his debt in bankruptcy.*"

DILLON, J.—I. *As to the motion of Greenwald & Co.*

The cardinal idea of the Bankrupt Act is an indiscriminating distribution of all of the effects of the debtor, to all of his creditors. This legislation is essentially founded upon the doctrine that *equality is equity.* When a debtor finds himself embarrassed, experience has shown that there arises in his mind a strong temptation, either to conceal his property, or to distribute it as his favor or his enmity, or both, may dictate. When creditors perceive their debtor's embarrassment, concert of action for the mutual benefit of themselves and the debtor becomes almost impossible, and the most vigilant or the most unfeeling seek an advantage or priority by means of writs of attachment, or other legal process, or by obtaining mortgages or confessions of judgment. Recognizing the essential equality of right of all the creditors of a common debtor, and the duty of the latter, if he cannot pay all in full, to pay all in equal proportions, and the practical impossibility of accomplishing full and equal distribution without stringent provisions, the Bankrupt Act prohibits the debtor from making, and the creditor (having reasonable cause to believe the debtor to be insolvent) from accepting any preference, in money or property, directly or indirectly, absolutely or conditionally, which contravenes the policy, or has the effect to defeat the purposes of the act.

The temptation to prefer, and the danger of doing so, inhere in the situation of an insolvent debtor; and hence it is (to use language applied to purchases of trust property by trustees) "the wise policy of the law has put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation." (Notes to *Fox* v. *Mackreth*, 1 Lead. Cas. in Eq., 161.)

The 18th, 23d, 29th, 35th, and 39th Sections of the Bank-

rupt Act abundantly evince the anxiety of the Legislature to guard against preferences, which operate as a fraud upon the policy of the act. Such preferences are not only prohibited and declared void, but certain penalties are denounced against creditors, who, under the circumstances specified, accept of preferences. Thus it is declared that such a creditor shall not "vote for, or be eligible as assignee," (Section 14) and "shall not prove his debt in bankruptcy," (Section 39, and compare Section 23) and shall be liable to the assignee for the money or property received. (Section 35.)

In the case now under consideration, the debtor, a retail merchant, three days before filing his petition to be adjudicated a bankrupt, sold his whole stock of goods to Greenwald & Co., his largest creditors. The assignee of the bankrupt, after his appointment, commenced, under the 35th Section of the Bankrupt Act, an action against Greenwald & Co., to recover the value of the goods which the bankrupt had transferred to them, in fraud, as it was alleged, of the provisions of that act. The petition in that action made the averments required by the law, among others, Richter's insolvency, his sale of his whole stock of goods to Greenwald & Co., out of the usual course of business, his intent to evade and defeat the Bankrupt Act, and the purchasers' reasonable cause to believe their vendor to be insolvent, etc. Issue was taken upon these allegations; the jury found for the assignee and judgment was rendered accordingly, and the amount of the judgment was paid by Greenwald & Co. to the marshal, on execution, but it was paid promptly on the same day the execution issued, or the next. And it is the effect of this judgment upon the rights of Greenwald & Co., as creditors of the bankrupt, that we are now to consider. And first we may remark, that this judgment, as between the estate of the bankrupt and Greenwald & Co., conclusively establishes that the purchase of the stock of goods by them from the bankrupt, was made in fraud of the Bankrupt Act. This is *res judicata*, and Greenwald & Co. are estopped to deny it. To entitle the assignee to a recovery in that suit, he would have to establish:

First. That Richter, when insolvent, or in contemplation of insolvency, made the transfer.

Second. That he made it with a view to give Greenwald & Co. a preference.

Third. That they had at the time reasonable cause to believe he was insolvent, and that it was made in fraud of the act, or to defeat or evade its provisions.

Having recovered, it is conclusively presumed that the assignee did establish each of these propositions, and if so, he then necessarily established that Greenwald & Co. sought to get a preference or advantage over other creditors, which was fraudulent in the contemplation of the Bankrupt Act. Greenwald & Co., having accepted a fraudulent preference, the question is, how does it affect their claim or debt, and their rights as creditors? The answer to this is given in the 23d and 39th Sections of the act. By the former section it is enacted that the creditor accepting a fraudulent preference "shall not prove the debt on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference."

By the latter section named, it is enacted, without qualification, that a creditor receiving a fraudulent preference "shall not be allowed to prove his debt in bankruptcy," and nothing is said about allowing proof of the debt, in case the creditor surrenders to the assignee the property, etc., received by way of preference. It is a settled principle of law that where there is a positive repugnancy between two sections of the same act, the last governs, as presumptively the latest expression of the legislative will. This rule is highly artificial, and is never to be applied where its application is not necessary. Another, and much more reasonable rule of law, is that a statute shall be so construed, if possible, that all of its provisions may stand; and in this case it is possible to give effect to Sections 23 and 39; either, first, by holding the former applicable to constructive, and the latter to actual and intentional frauds;

or, second, by holding the former applicable alone to cases of voluntary, and the latter alone to cases of involuntary bankruptcy; or, third—which would seem to be the correct view—construing the two in *pari materia*, applicable to both classes of bankruptcies, and to all cases falling within their terms, which would, by construction, annex the qualification in Section 23 to the proviso in Section 39; and both sections thus construed, should, as far as applicable by their terms, be applied to cases arising under Section 35 of the act. But this is a point on which we need not longer dwell, or give any positive opinion, since we will assume in favor of Greenwald & Co. that the 23d Section, which relates specifically to preferences, is the one which governs their rights. By this it is declared that whoever receives a fraudulent preference, "Shall not prove the debt or claim, on account of which the preference was made or given, nor receive any dividend therefrom until he shall have first surrendered to the assignee all property * * received by him under such preference."

Under these circumstances, and with this provision in force, Greenwald & Co. made the motion to prove up the balance of their claim, of the denial of which they now complain. Note the motion, it is "for leave to prove up the balance of their claim, viz.: One thousand four hundred and seventy-one dollars and eighty-eight cents, being the amount credited Richter, October 16, 1868, when said goods were obtained."

The statute is that they shall not prove up the debt or claim on account of which the preference was given. It was this precisely which, by the motion under consideration, they sought to have done, and which the court refused to allow.

It is urged by the claimants that this refusal was erroneous, because they had, before the time when they made their motion, surrendered to the assignee all property received by them under the preference. This devolves upon us the duty of interpreting the meaning of the word *surrender*, as it is here used. And it is our opinion that a creditor who receives goods by way of fraudulent preference, and who refuses the demand therefor which the assignee is authorized to make

(Section 15), denies his liability, allows suit to be commenced by the assignee, defends it, goes to trial, is defeated, and judgment passes against him, which he satisfies on execution, cannot be said, within the meaning of the statute, to have surrendered to the assignee the property received by him under such preference.

He has surrendered nothing. He accepted a fraudulent preference and defended it to the last. Paying a judgment which he stoutly resisted, and from which he could not escape, is not such a surrender as the statute contemplates. To hold that it was would be against the spirit of the statute, which is to discourage preferences. Such a holding would manifestly encourage them, for if the transaction should be upheld, the creditor would profit; if overthrown, he would lose nothing, and stand upon an equal footing with those over whom he had attempted to secure an illegal advantage, and whom he has, by litigation, delayed in the collection of their claims.

As a further argument in favor of this view, it may be suggested that the statute equally prohibits the *accepting* and the *giving* of a fraudulent preference. The fraud of the debtor in this respect is punished by disentitling him to a discharge. (Section 29.) It would seem strange if the law provided no penalty against the creditor who participated in the fraud upon the act; and there is no penalty or punishment if the view of the statute contended for by appellants' counsel be correct.

As a further argument in support of the opinion above expressed, it may be urged that when Section 23 is read in common with Sections 35 and 39, all being *in pari materia*, it will be seen that the surrender provided for in Section 23, is an act to be done by the creditor before the recovery of a judgment against him, as provided by Section 35. That is, the assignee may demand of the creditor the property received by him; if he surrenders it, he stands upon the same plane as the creditors, and may prove his debt and receive his dividends. If he refuses to surrender it, the assignee may sue as provided in Section 35; and if he recovers, and payment be made on an execution, this is not a surrender (which implies voluntary action on the part of the creditor), but a refusal to surrender.

So that the Bankrupt Act says decisively to every person who, under the circumstances specified, has received a preference: "Surrender what you have received and you shall lose nothing. If you refuse, and the assignee recovers the property or its value, you shall get nothing. Make your election." When this election may be made we are not now required to decide, further than to hold that it is too late to make it after the recovery of judgment by the assignee. (*In re* Tonkin & Trewartha, 4 N. B. R.)

II. *As to the motion of the assignee.* It will be recollected that the balance of the debt due Greenwald & Co., after deducting the goods purchased, viz., one thousand five hundred and twenty-nine dollars and sixty-four cents, was proved up and allowed against the estate of the bankrupt prior to the determination of the action of the assignee against Greenwald & Co., for the value of the goods purchased by the latter of the bankrupt.

After the judgment in favor of the assignee, the latter moved the District Court "to vacate and set aside" the allowance of the sum of one thousand five hundred and twenty-nine dollars and sixty-four cents, and for an order "directing the assignee not to pay over any dividend" to Greenwald & Co. on this claim.

The 23d Section of the act declares that if any person shall accept a preference contrary to the provisions of the act, he "shall not prove the debt on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, etc., * * received by him under such preference."

The court sustained the motion of the assignee, and made an order that he pay no dividends to Greenwald & Co., on that part of their claim which had been previously allowed.

If the debt of Greenwald & Co. was single and entire, the effect of the judgment recovered against them by the assignee was to establish, as an adjudicated fact, that they had received a fraudulent preference in respect to such debt; and if so, they are not entitled to receive any dividend, though their

claim may have been previously allowed, they having failed, as above held, to surrender to the assignee the property they received under the preference they accepted from their debtor.

The statute is express that such a creditor shall neither prove his debt nor receive any dividend therefrom, until he shall have first surrendered, etc. This leaves no room for construction, and the mere fact that the claim was proved up before the Register, anterior to the time when the assignee recovered the judgment which established the fraudulent character of the preference, is immaterial.

And here it is proper to be noticed, that it is "the debt or claim on account of which the preference was made or given" that shall not be proved, or be entitled to dividends, not some other and unconnected debt. If the debt is single and entire, the illegal preference affects the whole of it, though the property received does not equal it in value. But otherwise, if in their origin or by contract, the debts of the creditor are not single and entire, but divided or divisible and disconnected, and the creditor receives a preference distinctly as to one and not the other; for here he would be entitled to dividends on the one and not on the other. (See *Secor* v. *Sturgis*, 16 N. Y., 548; *Sweeney* v. *Daugherty*, 23 Iowa, 288.) The claim of Greenwald & Co., as filed with the Register, consisted of a running and apparently continuous account, made up of items of goods purchased at various times. *Prima facie*, as stated, it constituted but one "debt or claim" within the meaning of the Bankrupt Act, and hence there was no error in the ruling of the court that, by reason of the fraudulent preference they had accepted, they were not entitled to any dividend in respect to their debt. If they had applied to show that the debt preferred was disconnected from, and not the same debt as that which was proved up, the court would doubtless have granted the application, but apparently it was otherwise, and the court ruled correctly. Its ruling on the motion under consideration is affirmed. It would still be in the power of the District Court to allow Greenwald & Co. to show, if they can, that the debt on account of which they received the preference, is not

the same as that which they proved before the Register. If this is shown, the order made would be set aside; if not, it would of course stand. The orders appealed from are both affirmed.

Shiras, Van Duzee & Henderson, for the assignee.

Roberts & Fouke, for Greenwald & Co., appellants.

UNITED STATES DISTRICT COURT—MAINE.

On a petition by an assignee in bankruptcy to have a mortgagee adjudged guilty of contempt for violating an order of a United States District Court, enjoining him from foreclosing a mortgage or from prosecuting an action thereon, or from taking possession of mortgaged property when the mortgagee knew of the making of such order, but under advice of counsel evaded service thereon, the mortgagee will be adjudged guilty of contempt, and the amount of fine will be held open until the actual loss and cost to the assignee is ascertained.

Where the claim for damages by reason of the detention and loss of a seasonable market for the goods is not sustained by the evidence, same will not be allowed.

In re FEENY.

Fox, J.—This is a petition by James Hurley, the assignee in bankruptcy, that one Peter Smith may be adjudged guilty of a contempt, in violating an order of this court, passed on the 25th day of December last, enjoining him from foreclosing a mortgage on the stock in trade of said bankrupt, or from commencing or prosecuting any suit for or on account of any claim by virtue of said mortgage, or from taking possession of said stock, until the further order of this court. Notice of this petition has been given to said Smith, and he has filed a written answer thereto, admitting that he has commenced an action of replevin for the stock, but averring that the order of injunction had not been served upon him at the time he instituted the suit, and that he was not thereby in contempt.

On the hearing it was shown that a petition was filed by said Hurley, on the 7th of December last, against said Feeny, praying that he might be adjudged a bankrupt, for that he had given a preference to said Smith, *in fraud of the act*, by mort-

gaging to him, October 27th, 1869, his stock in trade, to secure sundry of his notes then overdue and held by said Smith. A trial was had before the jury on this petition, and on the morning of December 25th, a verdict was rendered in favor of the petitioner, and Feeny was thereupon adjudged a bankrupt.

Smith was a witness at the trial, was well aware of the cause for which Feeny was decreed bankrupt, and had previously consulted counsel in relation to it, Mr. Freeman, of Cherryfield, where both parties resided. Freeman was also a witness on the trial of the petition against Feeny.

Freeman having learned that a petition for an injunction had been or would be presented to the District Court to restrain Smith from commencing any suit in the State court for the mortgaged property, or from taking it into his possession, on the morning of December 25th, advised Smith that they were endeavoring to serve notice upon him of the petition or injunction, that he might be summoned to appear before the court, and that he had better commence his writ of replevin at once in the State court, before the injunction should be served upon him; and it was thereupon agreed that Freeman should leave that noon for Cherryfield, to sue out and complete service of the replevin writ, as soon as practicable. The marshal was unable to find Smith, to make service upon him of notice of the application for an injunction, and the court being satisfied that he was endeavoring to avoid service of the notice, and that he was fully advised of the pendency of the petition, on the same day, under authority of the provisions of the 40th Section of the Bankrupt Act, granted the injunction as prayed for, to continue until the further order of the court. Smith remained in Portland until noon of December 27th, and from his own testimony I find, that he believed the injunction had been obtained against him December 25th, and he therefore avoided the marshal, who endeavored to find him, to make service of the order upon him, and it was not legally served by the marshal, by a copy of the order, until December 31st, at Cherryfield, at which time and place he was in possession of

the mortgaged property, having taken the same on his writ of replevin, issued December 28th, 1869.

The assignee, in March, obtained an order for the sale of the goods, and demanded the same of Smith, who refused to surrender them unless his demand against Feeny was paid; the assignee then petitioned the court for an order on Smith for the delivery of them, and after notice to Smith of this petition, on the 26th of April, a warrant issued to the marshal to take possession of the property and deliver the same to the assignee, which warrant has been executed and the goods since sold at public auction. Expenses have been incurred by the assignee in thus obtaining possession of the goods from Smith, and in the defense of the action of replevin.

The respondent was informed on the 25th of December of the application for the injunction, and on the same day was satisfied and believed it had been ordered, and subsequently he sued out his writ of replevin, took possession of the property, and detained the same from the assignee until the last of April, when it was surrendered by him to the officer. His counsel apparently have supposed that there was no virtue or effect in an order for injunction until the same was legally served on the party by the marshal, and that if he could secrete himself and avoid service of the order, until the replevin writ could be obtained, that he would be justified in so doing, although he knew or believed the injunction had been ordered. This is a very grave mistake, and the rights of the assignee to an indemnity, for the damages occasioned by the breach of the injunction, cannot be in any way affected by the fact that the respondent acted under the advice of counsel. *Hawks* v. *Bennett*, 4 Paige, 163.

It was decided in the time of Lord Hardwicke, *Skip* v. *Harwood*, 3 Atkins, 545, that "when a person is present in court and has notice of the decree, if he does any act in contravention of the decree, he is guilty of a contempt, and is punishable for it, notwithstanding the order is not drawn up." In *Osborne* v. *Tennant*, 14 Vesey, 136, the defendant and his attorney were present in court when the motion was made for the

injunction, but were absent when the order was granted. Lord Eldon said, "I cannot attend to a distinction so thin, as that persons standing here until the moment the Lord Chancellor is about to pronounce the order, which, from all that passed, they must know will be pronounced, can, by getting out of the hall at that instant, avoid all the consequences." In *Kempton* v. *Eve*, 2 V. and B., 349, an order for injunction was granted. The defendant by his affidavit, admitted his belief that the order had been made, alleging that he acted by the advice of his counsel, who conceived that mere notice, without service of the injunction or order, had no effect. Lord Eldon said, "in this case, the party admitting that he believed the order was made, the principle is the same as if his belief was formed from information short of actual service." The party was adjudged guilty of contempt, and required to pay the costs.

The same principle was again re-affirmed by Lord Eldon in *Vansandaw* v. *Rose*, 2 Jac. and Walk., 266, so that the rule now is in England, that a party is liable for breach of an injunction, after notice of its having been obtained, although the order had not been served upon him. This rule is equally well established in this country, and was adopted by the court in *Hall* v. *Thomas et al*, 3 Edwards' Ch. R., 237; *Waffle* v. *Vanderheyden*, 8 Paige, 45; *Haring* v. *Kauffman*, 2 Beasley, N J., 399.

In this latter case it is stated "all that is required to enable the court to enforce obedience to its precepts, is that the defendant should have knowledge of the order for the injunction; and the court may punish the violation of the order, though the injunction be not served, if it appear that the defendant knew of its existence." Hilliard on Injunctions, p. 141, 143; 1 Smith's Ch. Prac., 623.

This respondent is clearly guilty of contempt by instituting his replevin suit after he believed the injunction had been ordered, and in taking and retaining the possession of the property; by thus proceeding, he has subjected the assignee to costs and expenses to which he would not otherwise have been subject, and the assignee is entitled to an indemnity. If the par-

ties cannot agree on the amount, it will be referred to the clerk to determine it. The only course at present is to adjudge the respondent in contempt, and leave the amount of fine open until the actual loss and cost to the assignee, by reason of his misconduct, is ascertained.

The claim for damages by reason of the detention and loss of a seasonable market for the goods, is not sustained by the evidence, and is not allowed.

The replevin suit having been discontinued, the only indemnity which should be allowed on that account is the expense the assignee has incurred in defending against it.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where wife of a member of a bankrupt firm loaned the firm, previous to its bankruptcy, moneys arising from the sale of property which had been held in her husband's name, but the proceeds of which were promised to her in consideration of her executing a deed therefor, said moneys not appearing on the firm books to the credit of the wife, but to credit of her husband as a member of the firm, no separate account appearing in the husband's separate account-books, except under the head of family expense—and where the husband purchased, as the agent of his wife in her absence from home, real estate, which was conveyed to her in her own name, and which real estate was improved by his wife through her husband, as her agent, and the implements paid for by firm checks, as in payment to her of her loans to the firm. This testimony being objected to as immaterial and irrelevant, and given under and subject to such objections, and the question as to what estate said bankrupt's wife had, and had she any estate except the property above referred to, and was she possessed of thirty-seven thousand dollars, being also objected to,

Held, the questions must be answered.

In re CLARK, WEST, MAXWELL, AND DAVIS.

I, ISAAC DAYTON, Register in Bankruptcy, having charge of these proceedings, and holding examination of E. Spencer West, one of the above-named bankrupts, under Section 26 of the Bankrupt Act of 1867, hereby certify that in the course of said examination certain questions hereinafter stated at length, were refused to be answered by said E. Spencer West, and

a certificate thereof and of the question so arising requested by him.

After testifying to the following effect:

That his wife had loaned his firm money; don't know how much, or when; but at one time, in 1863, five or six hundred dollars; at another time, in 1864, about twenty-two thousand dollars; that this loan was a portion of the proceeds of the sale of a house which stood in his name, and which he promised to give to her in consideration of her executing the deed, and she was opposed to the sale of the property, and had hesitated to execute it without that assurance, and he did so give it to her; that this house cost eighteen thousand dollars and sold for thirty thousand five hundred dollars; that the money received for this was in check of the purchaser, payable to order of the bankrupt; that these were transferred to his firm.

Q. 410. What account did your firm keep with your wife as to this money (loan of five or six hundred dollars in 1863)? A. The firm of Clark, West & Co. had no account with my wife, and kept no account at any time, but the loan went into my own individual private expense account, as agreed in our copartnership between Clark and myself, that the expense account of either larger than the other should draw interest.

Q. 428. Did you keep any account individually with your wife of this loan made by her, of the profits on the 34th street house and furniture? A. I kept no book-account, but we talked the matter over about what the amount was.

Q. 429. Was any account kept by the firm of this amount? A. All money that passed this way through me was kept in my family expense account.

That, in November, 1865, he heard by common report that land was for sale in 152d street; that his wife negotiated for this; was himself the party to the agreement, as his wife was away from home at the time it was drawn and executed. The price was sixteen thousand dollars. That his wife made the necessary payments; three thousand dollars of the purchase-money was paid in checks either of himself or Clark, West &

Co. Clark, West & Co. owed her that amount, they had been having the use of her money; the deed of the property is in the name of his wife, Mrs. Sarah O. West.

That his wife built upon the property; that he acted as her agent in calling at various places to ascertain the price of materials, and after consultation about the price requested the material to be sent and delivered, and on presentation of the bill it would be paid for, and with various parties who were in the habit of performing certain portions of the work on the buildings, and that workmen they would employ would be paid on Saturday; don't know that he ever informed any one that he acted as agent, may have done so; that he did not hire any workmen. The bills were presented to his wife; he looked over the most of them; bills were paid by checks of Clark, West & Co. The checks which were so given were to return the loan made by his wife. The work was done by the day's work; no accounts or memorandums were kept of payments or amounts due. Don't know how much it cost to build.

Had some receipts and some checks (returned from bank), but these are lost or destroyed.

This property he thinks worth sixty or seventy thousand dollars, or more, perhaps, but there are three mortgages on it —one for twelve thousand dollars, one for twenty-five thousand dollars, and one for fifty thousand dollars. There are sixteen lots in all; there is a brick house, frame house, and stable upon them; don't think he would advise their sale for four thousand dollars per lot.

When the first frame house was completed he removed into it, and has remained there ever since, and has not paid his wife any rent; the second house (brick) is for sale, applications to be made to bankrupt.

Don't know how much firm owed Mrs. West at any time; don't know how much has been paid to his wife, or for her use; think she has been paid in full with interest.

No account has been kept with Mrs. West in books of the firm, or in bankrupt's private books, nor any account with E. S. West in the books of the firm (except his general expense

account and loan-book account) to show how much Mrs. West was creditor or debtor at any time.

(All the foregoing testimony relating to the property of the bankrupt's wife was objected to as immaterial and irrelevant, and the questions were answered subject to that objection.)

Q. 632. What estate has Mrs. Sarah O. West?

Objected to as irrelevant, and requested to be certified by counsel for bankrupt.

Q. 633. Is Mrs. S. O. West possessed of any estate except the property in 152d street?

Same objection and request.

Q. 634. Is Mrs. S. O. West possessed of thirty-seven thousand dollars.

Same objection and request, which questions the bankrupt requested to be certified to the judge for his opinion, which is hereby done.

Dated 1st of November, 1870.

ISAAC DAYTON, *Register.*

BLATCHFORD, J.—The questions must be answered. The clerk will certify this decision to the Register, Isaac Dayton, Esq.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

On the 2d day of December, 1870, A filed a petition against the bankrupt. An order to show cause was granted, returnable December 10. The case was adjourned till May 31, 1870, when, no one appearing, the proceedings were dropped. Subsequently B, another creditor, filed a petition alleging the bankrupt's indebtedness to him, and after alleging the filing and abandonment of A's petition, prayed that bankrupt might be adjudicated upon A's petition.

Held, B's application must be dismissed, on the ground that it should have been made on the return or adjourned day.

In re OLMSTED.

On the 2d of December, 1869, Fordyce, a creditor of Olmsted, filed a petition in bankruptcy against him. The usual order to show cause was granted, returnable December 10th. On the return day the debtor did not appear, and on the mo-

tion of the petitioning creditor the case was adjourned, and on subsequent days it was further adjourned till May 3d, 1870, and no one appearing on that day the proceedings were dropped.

On the 13th of September following, another creditor, Filkins, filed a petition alleging in the usual form the indebtedness to him, and after alleging the filing of the Fordyce petition, and its abandonment, as stated above, prayed that Olmsted might be adjudicated upon Fordyce's petition—his own petition not alleging any act of bankruptcy as committed within the six months prior to September 13th, 1870. The court granted an order that Olmsted show cause why adjudication should not be granted and provided for service upon Fordyce and his attorney. On the return of this order execution was taken on Filkins' petition.

Gorham, for debtor, argued that the petition of Filkins did not state facts sufficient upon which to make adjudication, and that under the last paragraph of Section 42 of the Bankrupt Act, the adjudication must be made upon his petition and not upon the petition of Fordyce, because the act provides that the court may, upon the petition of any other creditor, proceed to adjudicate upon *such* petition, and that the word *such* can only refer to the petition of the new creditor.

Further, that Filkins not having presented his petition upon the return or adjourned day of the Fordyce petition, he is too late, and cannot avail himself of the provisions of the act; and cited in support of this point *in re* Camden Rolling Mill Co., 3 N. B. R., 146.

Hughitt, for Filkins, argued that the new creditor was entitled to come in at any time, and was not limited to the return or adjourned day; and that the adjudication must be had upon the petition of Fordyce, and that Filkins' petition was only supplemental to Fordyce's.

HALL, J., wrote no opinion, but after considering the case dismissed the application, and held the exceptions of the debtor well taken on the ground that the application of Filkins should have been made on the return or adjourned day, and said, that

the reason of this rule was that the debtor was then in court, advised of the charges against him, and that it was then competent for the second creditor to take up and enforce the proceedings abandoned by the first creditor; but if he allowed that time to pass he could no longer rely upon that petition as his basis of action, but must begin anew and bring the debtor into court upon his own motion and proceeding.

UNITED STATES DISTRICT COURT—MARYLAND.

When in an involuntary case the petitioners failed to subscribe the affidavit to the petition,

Held, the petition was defective, inasmuch as the forms prescribed by the Supreme Court required the affidavit and petition to be subscribed by petitioners. Defect incurable, since petition was not a petition *in propria forma*, such as could be amended.

In re Moore & Brother *v.* Harley.

This was a case of involuntary bankruptcy. The petition was regularly subscribed and sworn to, and the Register who took the affidavit of the petitioners had signed his name in due form. But the petitioners had not subscribed the affidavit to the petition. Thereupon the respondent demurred to the petition, alleging that the petitioners had not by their petition made such a case as entitled them to have the respondent declared a bankrupt, within the provisions of the Act of Congress entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867. Upon the hearing the demurrer was sustained, and the petition dismissed with costs.

It was held that the petition was defective, inasmuch as the forms prescribed by the Supreme Court required that the affidavit as well as the petition should be subscribed by the petitioners, and that the defect was incurable, since the petition was not a petition in *propria forma*, such as could be amended.

R. McLaughlin, Esq., for plaintiffs.

Albert Ritchie, Esq., for defendants.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

Where an application for a discharge had been made prior to July 14th, 1870, and a reference ordered to a Register in bankruptcy to take necessary proofs and ascertain if the assets were not equal to fifty per cent. of the claims proved against the estate of the bankrupt, upon which he was liable as principal debtor, the Register not having made his report thereon until after the amendment to the Bankrupt Act, approved July 14th, 1870, the bankrupt filed a supplemental petition referring to the amendment of July 14th, 1870, and the court modified its original order of reference, and directed the Register, in addition to the requirements of the first order, to determine and report whether the assets were equivalent to *fifty per cent.* of the debts and liabilities contracted after January 1st, 1869.

Upon the report of the Register to the effect that he had examined the several papers before him (including a consent to the bankrupt's discharge), that the proofs appeared satisfactory; and *there being no opposing interest*, that the assets of the bankrupt were equal to fifty per cent. of claims proved on account of debts and liabilities contracted subsequent to January 1st, 1869, upon which he was liable as principal debtor, that the assent in number and value of creditors who had proved their claims on debts contracted subsequent to January 1st, 1869, had not been filed, and that under the amendments to the Bankrupt Act, approved July 27th, 1868, and July 14th, 1870, the bankrupt was entitled to his discharge. Discharge granted by the court.

In re Rockwell & Woodruff.

The petition and application of the above named H. Lewis Woodruff for a discharge from his debts, having on the 11th day of March, 1870, come on to be heard, and it being alleged in behalf of said bankrupt, that due notice to his creditors has been given as required by law; and it appearing that the proceedings in this case were commenced after the 1st day of January, 1869:

On motion of Mr. J. Benedict on behalf of said bankrupt, it is ordered that it be, and it is hereby referred to William H. Comstock, Esq., one of the Registers in bankruptcy of this judicial district, to take the necessary proofs, and to ascertain and report to this court, with all convenient speed, whether the assets of the said bankrupt were or were not equal to fifty per cent. of the claims proved against the estate of the said bankrupt, upon which he is liable as the principal debtor, and which claims had been proved prior to the making of this order; and whether the assent in writing of a majority in num-

ber and value of the creditors of said bankrupt, to whom he had become liable as the principal debtor, and who had proved their claims, had been filed in this case before the time of the said hearing of the application for such discharge on the said 11th day of March, 1870, above mentioned, as required by the amendment to the Bankruptcy Act, approved July 27th, 1868; and also, whether the said bankrupt has in all things conformed to his duty under the Bankruptcy Act of the United States and the amendments thereof, and is entitled, under the provisions thereof, to receive a discharge.

And it is further ordered, That the assignee of any creditor of said bankrupt, as well as the said bankrupt, may appear and produce proofs, and examine and cross-examine witnesses upon the said reference, and that the proceedings and report of the said Register, in pursuance of this order, shall stand confirmed and be conclusive upon the questions hereby referred, unless the same shall be excepted to within the time and in the manner required by the Rules and Practice of this court.

N. K. Hall.

The petition of H. L. Woodruff, of the city of Utica, county of Oneida, and State of New York, respectfully showeth: That he has already filed his petition to this court for his final discharge from his debts, in pursuance of the Bankrupt Act; and that prior to the 14th of July, 1870, an order was made by this court referring the matter to William H. Comstock, Esq., a Register in bankruptcy, residing in Oneida county, to ascertain whether the assets of the late firm of James Rockwell & Co., of which he was a member, were equivalent to fifty per cent. of the debts and liabilities of said firm; but that since said order was granted, to wit: on the said 14th day of July, 1870, Congress amended said act so as to require the fifty per cent. clause to apply only to those debts which were contracted since the 1st day of January, 1869, and not to those debts that were contracted prior to that time.

Your petitioner, therefore, prays that this court will grant an order amending said last mentioned order, so that the in-

quiry before the said Register shall apply only to those debts contracted since the 1st day of January, 1869, instead of those prior to that time, and for such relief as this court may deem proper to grant.

H. LEWIS WOODRUFF, *Petitioner.*

Dated Utica, August 27th, 1870.

United States of America. }
Northern District of New York. } *ss.:*

I, H. Lewis Woodruff, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief; that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

H. LEWIS WOODRUFF, *Petitioner.*

Subscribed and sworn to before me, this 29th day of August, 1870.

J. E. L. HAMILTON, *Notary Public,*
Oneida County, New York.

At the District Court of the United States for the Northern District of New York, on the 30th day of August, 1870: Present, Hon. NATHAN K. HALL, Judge.

On reading and filing the petition of H. Lewis Woodruff, and on motion of Mr. J. Benedict, attorney for petitioner, it is ordered, that the order heretofore made in this matter, dated April 7th, 1870, be so far modified that the said Register shall, in addition to what is required by said order, take proofs, determine, and report whether the assets of the late firm of James Rockwell & Co. are equivalent to fifty per cent. of their debts and liabilities contracted after the 1st day of January, 1869, in pursuance of an amendment of the act, entitled "An Act establishing an uniform system of bankruptcy throughout the United States, approved July 14th, 1870," and make his report with all convenient speed.

N. K. HALL.

At Utica, in said district, on the 3d day of October, 1870, before William H. Comstock, Register in bankruptcy, to whom this matter was referred.

To the Hon. Nathan K. Hall, District Judge:

Sir:—In pursuance of orders, copies of which are hereto annexed, I proceeded to take the necessary proofs in this matter. I have carefully examined all the papers filed in my office in this matter, and also the affidavit of bankrupt before discharge; the certificate of Register; affidavit of assignee; consent of creditors that discharge be granted to said bankrupt; proof of publication of notice to show cause why a discharge should not be granted, and clerk's certificate of serving notices of application for a discharge; which papers are on file in the United States District Clerk's office for this district, at Buffalo, New York.

These proofs before me being satisfactory to me, and there appearing no opposing interest: Wherefore I find that the assets of said bankrupt were equal to fifty per cent. of the claims proved against the estate of the said bankrupt, on account of debts and liabilities contracted on and after January 1st, 1869, upon which he was liable as principal debtor, and which claims had been proved prior to the making of said order, and that the assent in writing of a majority in number and value of the creditors of said bankrupt, to whom he had become liable as the principal debtor, on and after the 1st day of January, 1869, and who had proved their claims, had not been filed in this case before the time of the said hearing of the application for such discharge, on the 11th day of March, A.D. 1870, as required by the amendments of the Bankrupt Act, approved July 27th, 1868, and July 14th, 1870; and that the said bankrupt has in all things conformed to his duty under the Bankruptcy Act of the United States, and the amendments thereof, and is entitled under the provisions thereof to receive his discharge.

W. H. Comstock, *Register in Bankruptcy.*

At Buffalo, in said district, on this 14th day of October, 1870.

In re Rockwell & Woodruff.

This case having heretofore, to wit, on the 15th day of February, 1870, come on to be heard upon the petition and application of the said bankrupt for a discharge from all his debts; and upon the order heretofore made thereon, that all creditors who had proved their debts, and all persons in interest, might appear on the day last mentioned, at 10 o'clock in the forenoon, and show cause, if any they had, why the prayer of the said petition should not be granted; and it now appearing that notice of such order has been given as required by law and the practice of the court; and that the said bankrupt has in all things conformed to his duty under the Act of the Congress of the United States, entitled, "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and is entitled, under the provisions thereof, to receive a discharge, *It is hereby ordered*, adjudged, and decreed, that this court do grant, and it hereby does adjudge, decree, and grant to the said H. Lewis Woodruff, individually, and as a member of the late firm of Rockwell & Woodruff, the said bankrupt, a discharge from all his debts, except as in said act provided.

And it is further ordered, adjudged, and decreed, that a certificate of such discharge, under the seal of this court (attested by the clerk thereof), in the words and figures following, viz.:

Whereas, H. Lewis Woodruff, of the city of Utica, in the county of Oneida, and State of New York, has been duly adjudged a bankrupt under the Act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court, that said H. Lewis Woodruff, individually and as a member of the late firm of Rockwell & Woodruff, be forever discharged from all debts and claims, which by said act are made provable against his estate, and which existed on the 29th day of May, 1869, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and seal of the court, at Buffalo, in [L. S.] the said district, this 14th day of October, A. D. 1870.

ATTEST. N. K. HALL, *Judge.*

M. P. FILLMORE, *Clerk.*

be immediately signed by the judge of this court, and given to the said bankrupt.

And thereupon the certificate of the discharge of the said bankrupt, under the seal of this court, attested as aforesaid, and in the words and figures aforesaid, was duly signed by the said judge, and given to the said bankrupt on the day and year in the caption of this order and decree above mentioned.

In testimony whereof, and of the proceedings in this matter, on the same day and year, and at the place mentioned in the caption hereof, the record thereof is duly signed by the clerk of the said court.

M. P. FILLMORE, *Clerk.*

UNITED STATES CIRCUIT COURT—MISSOURI.

1. When a sale or conveyance by the bankrupt before bankruptcy is void as to creditors, under the local statute of the State where he resides and the sale or conveyance is made the assignee of the bankrupt who represents in this respect the rights of the creditors, may impeach the same and bring suit for or in respect to property sold or conveyed.
2. The statute of the State of Missouri as to fraudulent conveyances, construed and applied by Dillon, Circuit Judge.

ALLEN, *Assignee, etc., v.* ELIZA A. MASSEY *et al.*

THIS is an appeal from the District Court of the United States for the Eastern District of Missouri. The plaintiff, as the assignee in bankruptcy of William Downing (3 N. B. R. 741), filed his petition in February, 1870, in the said District Court against the defendants, representing that in October, 1868, the said bankrupt executed a bill of sale to Eliza A. Massey of certain household furniture in the possession of the bankrupt; that the property was never actually delivered to her, but the same has ever since been in the residence and possession of the

bankrupt; that by reason thereof the bill of sale is void by force of the statute of Missouri relating to fraudulent conveyances, and the prayer is that an order may be entered declaring the sale to be void and the property delivered by the defendants to the assignee.

The answer admits the execution of the bill of sale as alleged; denies that the property was never delivered to the said Eliza A., and alleges that the same was purchased by her in good faith of the said Downing, and that the same has ever since been and now is in her actual possession.

The evidence adduced in the court below, consists of the bill of sale and the deposition of Downing.

The bill of sale, acknowledged, but never recorded, is dated October 31st, 1868, and by it Downing, for the recited consideration of three thousand six hundred and forty-five dollars, sells and conveys to Eliza A. Massey "the following furniture and other personal property now owned by me and *being in my residence* situated on the north side of Washington avenue, being No. 1347, in the city of St. Louis." Here follows a detailed description of furniture in library, parlor, and bed-rooms, consisting of chairs, sofas, books, carpets, pictures, mirrors, etc.

The deposition of Downing, the bankrupt, disclosed the following facts:

That he had lived in house No. 1347 on Washington avenue, above mentioned, for five years or more, and still lived there; that the house belonged to him; that Mrs. Massey was his sister-in-law, and that she and her husband, John Massey, had lived with him and his family for over fifteen years, the two making, from time to time, an amicable adjustment of expenses. Downing's name was on the door-plate of the house, and the house and establishment were known as his. The furniture and property in question were his prior to the alleged sale to Mrs. Massey. Downing was engaged largely in business, but in October, 1868, his partner allowed a note of the firm to go to protest, and, fearing the consequences, and desiring to secure his sister-in-law three thousand six hundred and forty-five dollars which he owed her, he made to her the bill of sale above-mentioned, she being, at the time, in the house and living with

him in the manner before stated. An inventory seems to have been taken of the property; no separate valuation was, however, affixed to the different articles, but the whole was sold for the sum named. It is shown that the chief purpose of the inventory or list of the articles was to enable the property to be described in the bill of sale which it was in contemplation to have drawn.

No act of delivery is testified to except that the bankrupt says he took Mrs. Massey around and showed the property to her. It is admitted that the parties continued to live together as before, in the house; that no change was made; that the property continued to be used as it previously had been; and that Downing's name still continued on the door-plate, etc., etc.

On the hearing before Judge Treat, the District Court found that the bill of sale was void, and ordered the defendants to deliver the property therein described to the assignee.

From this order or decree the defendants appeal.

Daniel Dillon, for appellants, cited *Stewart* v. *Lambe*, 1 Brod. and Bingh., 506; *Benton* v. *Thornhill*, 7 Taunton, 149; *Ludlow* v. *Hurd*, 19 Johns., 220; 4 Wend., 514; *Waldoe* v. *Doll*, 29 Cal., 556; *Hamill* v. *Willett*, 6 Bosworth, 534; *Funk et al.* v. *Staats*, 24 Ill., 646; *Kenningham* v. *McLaughlin*, 3 Monroe, 30; 7 Monroe, 99; *Born et al.* v. *Shan*, 29 Penn. State R., 292; *Hutchins* v. *Gilchrist*, 23 Verm., 82; *Mc Vicker* v. *May*, 3 Penn. State R., 224; *Clayton* v. *Brown*, 17 Georgia, 217; *Bissell* v. *Hopkins*, 3 Cowen, 166, and note where the authorities are collected and reviewed, and the general rule, with its twenty-four exceptions, laid down; *State ex rel. Heed* v. *King et al.*, 44 Missouri, 239.

Appellants also contend that the assignee, standing in place of bankrupt, cannot maintain this action to set aside this sale.

Hitchcock & Lubke, for appellee:

First. The assignee had a right to the relief sought in his petition. Hilliard on Bankruptcy, Section 43, pp. 134 and 135.

Second. The bill of sale was fraudulent and void in law, under the statute of Missouri. General Statutes of Missouri, 1865, Section 10, C. 107, p. 440. *Claflin* v. *Rosenberg*, 42 Mo., p. 439, Section 43; *Id.*, 593; *State to use*, etc. v. *King*, 34 Mo., 238.

DILLON, J.—Neither in his petition nor in argument does the assignee base his right to the relief demanded upon the ground that the bankrupt did not, in fact, owe Mrs. Massey the debt which the bill of sale was made to pay or secure, nor upon the ground that the sale was fraudulent because made to hinder and delay the creditors of Downing, the vendor.

The assignee places his case solely upon the statute of the State of Missouri relating to Fraudulent Conveyances, the 10th Section of which is in these words:

"Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith."—Statutes 1865, p. 440, C. 107.

The sale by the bankrupt to Mrs. Massey, is within the statute. It was an absolute sale of goods in the possession of the vendor. There was no delivery of the property, or, if any, but a momentary one, and it was not followed by any actual or continued change of possession. This being so, the statute enacts that the sale "shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith."

With the policy of a statute which, irrespective of the fact of fraud or the intention of the parties to defraud, inexorably denounces as fraudulent, *per se*, all sales not accompanied by the required delivery and by actual and continued change of possession, the courts have nothing to do, and it does not become them to question the legislative wisdom.

The purpose of the statute is to prevent the vendor from acquiring a false and delusive credit, and to prevent purchasers from being ensnared by means of secret sales.

Hence the provision that the sale shall, as required, be accompanied with delivery, and this by an actual and continued change of possession. The purpose of the enactment being to protect the public from deception, the *indicia* of a change of owners should be such as to accomplish this end. The new owner should fly his own and not his vendor's flag. This is the construction which the statute has received from the Supreme Court of the State. In *Claflin* v. *Rosenberg*, 42 Mo. R., 439, speaking of this statute, Wagner, J., remarks that "the vendee must take actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands. * * This necessarily excludes the idea of a joint or concurrent possession."

On a critical examination of the case just cited, it will be seen that the exact point of the decision is that the possession of the vendee must, as against the vendor, be actual and *exclusive.*

This is the leading case upon the statute in question, and it has been subsequently re-affirmed and followed. *Claflin* v. *Rosenberg*, 43 Mo., 593; *State, etc.*, v. *King*, 44 *Id.*, 238; *Lessem* v. *Herriford*, *Id.*, 323. See Twyne's case and American Notes, 1 Smith Lead. Cas., 33.

We deem it prudent to observe that in the case at bar, it is not necessary to go so far as to say that in no case can a sale be upheld where the vendor is in possession concurrently with, or rather subordinate to, the vendee or his agent. This may depend upon the existence of the circumstances of a nature fairly to put the public upon notice.

In this case there was no actual delivery, no continued change of possession, *no circumstances of any kind*, whereby either creditors or purchasers could know that any change of owners had taken place.

The defendants make a point that the situation of the par-

ties to the sale and the property was such that no delivery and change of possession other than such as were made was practicable, and hence more ought not to be required.

The statute refers to "the situation of the property," not of the parties; but, without emphasizing this suggestion, it seems to us that the statute has reference to property so situated as not to be at the time capable of immediate actual delivery and change of possession, such as growing crops, bulky articles, etc., and not to cases where the property is present and capable of being delivered to the vendee and retained in his possession and control.

Since, in a case like the present, this court will follow the construction given to the local statute by the highest court of the State, it is not deemed to be necessary to follow the appellant's counsel into an examination of the decisions under the statute of Elizabeth, or the statutes of other States.

The defendants also contend that even if such be the construction of the statute, the assignee has no right to impeach the sale, and have the property delivered to him. This view cannot be maintained. If Downing had not gone into bankruptcy, any creditor of his could have subjected the property to the payment of his debt. In this respect the assignee represents the creditors. In consequence of Downing being adjudicated a bankrupt, his creditors are precluded from proceeding against him, and hence the assignee has the right given to him in terms by the Bankrupt Act, to proceed in the way which the present plaintiff is pursuing. *Carr* v. *Hilton*, 1 Curtis, C. C. R., 233; Hilliard on Bank., 134, Section 43, and cases cited; Bankrupt Act, 1867, Sections 14, 35.

The result is that the order of the District Court must be affirmed.

Krekel, J., concurs.

UNITED STATES DISTRICT COURT—MICHIGAN.

1. *Held*, that the 35th Section of the Bankrupt Act, which declares a sale, transfer, etc., not made in the usual and ordinary course of business of the debtor, shall be *prima facie* evidence of fraud, throws the burden of proof on the purchaser to sustain the validity of his purchase.
2. That in such a case the proofs may be taken *ore tenus* at the hearing.
3. That under the evidence in this case the sale was void.

WILSON, *assignee of* CUMMINGS, *v.* STODDARD.

WITHEY, J.—The petition upon which this hearing is had, was filed by plaintiff, and alleges that about the 10th of August, 1868, the bankrupt made to defendant a sale and transfer of a stock of goods of the value of six thousand dollars, and within six months from the filing of the petition upon which Cummings was declared a bankrupt; that Cummings was then insolvent, that defendant had reasonable cause to believe him insolvent, and to be acting in contemplation of insolvency, and that the transfer was made with a view to impair, hinder, impede, and delay the operation and effect of the provisions of the Bankrupt Act. Defendant was ordered to show cause; and having denied the allegations of the petition, the case has been heard upon proofs.

Defendant's counsel has taken exceptions to the petition and to the proofs being taken *ore tenus* at the hearing, which are overruled.

The facts disclose that Cummings was at the date of the sale insolvent, and that defendant knew of his embarrassed condition. Defendant's counsel conceded this upon the argument.

Cummings was a trader at Plainwell, Allegan county, in this district, and had been for several years doing a general country trade.

At the time of the sale of his goods to defendant, there was a mortgage lien thereon of two thousand two hundred dollars to one Sissen, of Plainwell, for money loaned; and also a mortgage to one Brigham, on that part of the stock composed of boots and shoes, on which was unpaid two thousand eight

hundred dollars. Cummings owed among other indebtedness in addition to those mortgage debts, one thousand dollars to one Cory, being the amount of two notes of five hundred dollars each, on one of which defendant was liable as indorser. He also owed defendant one thousand one hundred and four dollars not secured, and four hundred dollars to parties not named. Of all this indebtedness defendant admits to have had knowledge when he bought the property of Cummings. His purchase amounted to six thousand one hundred and ninety-seven dollars and twenty-seven cents for goods, and about fifty dollars for accounts bought from Cummings—say six thousand two hundred and forty-seven dollars, total purchase price of goods and accounts. He was to pay by canceling Cummings' debt to defendant of one thousand one hundred and four dollars and fifty-one cents; paying the notes of Cummings to Cory, five hundred dollars and five hundred and four dollars respectively, and by paying Sissen's mortgage of two thousand two hundred dollars. He also gave Cummings his two notes—one for one thousand dollars, the other for eight hundred and eighty-eight dollars.

Other creditors have proved debts of more than four thousand dollars against the bankrupt, of which defendant swears he had no knowledge. The sale by Cummings to defendant covered all the bankrupt's property except the boots and shoes, part of his stock mortgaged to one Brigham, and by him taken, at or about the time of sale to defendant, to satisfy two thousand eight hundred dollars.

The provision of Section 35 of the Bankrupt Act, which declares a sale, transfer, etc., not made in the usual and ordinary course of business of the debtor, shall be *prima facie* evidence of fraud, throws the burden of proof on defendant to sustain the validity of his purchase. Defendant swears that he did not know Cummings owed more than four hundred dollars over the two mortgage debts, the debt due to himself and the other indebtedness, which by the terms of purchase he assumed to pay; and urges that, such being the fact, the *prima facie* case of fraud is conclusively met, and shows the sale to have been

in all respects *bona fide*, and in no wise a fraud on the provisions of the Bankrupt Act. Standing alone, this testimony might be sufficient explanation; but when viewed in connection with other testimony, I cannot regard the sale as one entitled to the sanction of the court. When the mortgage to Sissen was made, June 25th, 1868, defendant was placed in the store as agent of the mortgagee, to see that the terms of the mortgage were complied with in regard to keeping up the stock, and applying sales to its payments. Defendant from that time acted more or less as clerk in Cummings' store, up to the time of his purchase—was familiar with Cummings' business affairs, had access to his books of accounts, and to his invoices of purchases. He knew of the two mortgages on the stock, was a creditor for over one thousand one hundred dollars, indorser on one of Cummings' notes to Cory of five hundred dollars, and knew of the other note of five hundred dollars to Cory. He knew, too, that Cummings was unable to pay this indebtedness, much of it due, and from his relations to Cummings as a creditor, as agent of one mortgage, and as clerk in the store, must be supposed to have been watchful of Cummings' affairs, and have known pretty fully as to his pecuniary standing.

Cummings was upon the point of going away as some sort of an itinerant lecturer, breaking up his business, and without any property left from which other debts could be satisfied. A question arose, while taking the inventory of stock, as to the safety of defendant purchasing, when he was advised by an attorney present, that if Cummings was indebted beyond what it was proposed to arrange, it would not be safe to purchase. Cummings denied that there were any other debts except four hundred dollars. Defendant was thus warned, and prudence required that he should act with reference to the existing state of things. Again, Cummings' indebtedness, according to defendant's testimony, was all to parties residing at Plainwell, where the debtor resided, except the four hundred dollars to parties in Chicago. And yet Cummings had been a trader at Plainwell for many years, purchasing his goods in New

York, Chicago, Cleveland, and other places, as defendant well knew. Now, is it reasonable to say or believe that defendant did not know, or, at least, have reasonable cause to believe, that this trader owed debts on his purchases, as it is shown he did, to an amount exceeding four hundred dollars, and when it was known that he was largely indebted at home, and purchased his goods abroad? Defendant, while taking account of stock, consulted the invoices of purchase, and one witness testifies that defendant said to him, after the purchase, he bought the goods to protect himself.

I cannot doubt for a moment but defendant knew of Cummings' insolvency and indebtedness to some extent outside of home debts, and that he purchased the goods to protect his own interests, in utter disregard of the rights of a large number of other creditors. Defendant assumed the payment of no part of Cummings' debts, outside of one note of five hundred dollars to Cory, who was his brother-in-law, except what it was to his interest to pay. Sissen's two thousand two hundred dollar mortgage was a lien on the goods. Defendant could get no title except subject to this mortgage. He was liable to Cory on one of the five hundred dollar notes held by his brother-in-law; the other he assumed to pay.

I hold the sale void, under the evidence, by the terms of the Bankrupt Act. The plaintiff is satisfied to take judgment for three thousand five hundred and forty-three dollars, and, although I think he is entitled to recover more, I will take that sum as the amount of defendant's liability in this case, with costs of the proceedings.

D. M. Dickinson and *George Gray*, for plaintiff.

John T. Holmes, for defendant.

UNITED STATES CIRCUIT COURT—MASSACHUSETTS.

Jurisdiction is given to the Circuit Court under the 2d Section of the Bankrupt Act, to revise all rulings, orders, and decrees of the District Court; the word "pending," as used in that section, being intended to describe

the particular circuit in which the jurisdiction shall be exercised, and not the state of the matters to be revised.

A delay to file a petition for revision in the Circuit Court, from May 12th, 1869, to June 13th, of the same year, is not unreasonable in the absence of any rule upon the subject in that court, unless such delay has operated to the prejudice of the opposite party.

The Circuit Court has jurisdiction of a petition to revise the decision and judgment of the District Court refusing to grant to a debtor a certificate of discharge from his debts under the Bankrupt Act.

Such a petition should set forth in what the error in the decision or judgment of the District Court consists, and the nature of the error, for the information of the Appellate Court, and as notice to the opposite party.

CLIFFORD AND SHEPLEY, J. J.

LITTLEFIELD *v.* DELAWARE AND HUDSON CANAL COMPANY.

CLIFFORD, J.—Leave to amend the petition was asked and granted in this case before the parties were heard upon the issues involved in the pleadings. As amended, the allegations of the petition are, that the petitioner has conformed in all respects to the provisions of the Bankrupt Act, and that the petitioner verily believes that he is entitled to a certificate of discharge from all his debts provable under that act, and that he is aggrieved by the refusal of the District Court to grant him such a discharge. Wherefore he prays that he may have a hearing in this court upon the matter of his discharge, and that the decision of the District Court, refusing the same, may be reviewed and reversed, and that a discharge may be granted to him pursuant to his petition. Order of notice was granted on the petition for review filed in this court, and on the return day named in the order, the creditors named in the petition appeared and demurred to the petition, showing the following causes of demurrer; 1st. That the petitioner has not prayed for any relief. 2d. That he has not specified what further proceedings, if any, are desired in his case. 3d. That he does not allege that there was, at the time he filed his petition in this court, any matter pending in the District Court to which his petition could apply. 4th. That the rights of the respondents as creditors to hold and dispose of their claims, and maintain an action at law on the same against the petitioner, had, before he filed his petition in this court, vested in them under and by virtue of the decision and judgment of the District Court, that he was not entitled to a discharge from his debts. 5th. That

the petitioner was guilty of unreasonable delay in filing his petition. 6th. That the Circuit Court has no jurisdiction of the petition to revise the decision and judgment of the District Court refusing to grant to the petitioner a certificate of discharge from his debts under the Bankrupt Act.

Remarks in respect to the first and second causes of demurrer are unnecessary, as they are obviated by the amendment, filed by leave of court, which prays that he may be decreed by the court to have a full discharge from all his debts provable under the Bankrupt Act, and that a certificate thereof may be granted to him as therein provided.

Evidently there is no merit in the third cause of demurrer, as there could not be any ground of complaint before the decision of the District Court was rendered. Had the petition been filed before the decision was rendered, the decisive answer to it would have been that it was premature, and if it cannot be filed afterward, then the provision is nugatory, which cannot be admitted. By the 2d Section of the Bankrupt Act it is enacted "that the Circuit Court within and for the district where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act." 14 Stat. at Large, 517.

Reliance is placed upon the word pending as giving support to the proposition that it is only while the proceedings are actually pending in the District Court that the Circuit Court can take jurisdiction of a petition like the one under consideration. Interlocutory orders, it is conceded, may be revised, but the argument is that a final decree terminates the appellate jurisdiction of the Circuit Court, as the matter from that moment ceases to be pending in the District Court. Matters involved in a final hearing can only be disposed of by a final decree, and if they cannot be revised after they have been disposed of in the District Court, then they cannot be revised at all, as it is clear that the orders and decrees of a subordinate court cannot be revised before they are made or rendered. Manifestly, the construction assumed by the respondent is one which cannot be sustained, as it would defeat the obvious intention of Congress,

which was to subject every ruling, order, and decree of the District Court in such cases to the re-examination and revision of the Circuit Court. Nor is it necessary to adopt that view in order to give full effect to every word of the section. Juris diction is conferred upon the Circuit Court within the district where the proceedings shall be pending, but the meaning of Congress in employing that language was to describe the particular Circuit Court in which the jurisdiction should be exercised and not the state of the matters to be revised, as it was clearly the intention of Congress that all such matters should be subject to revision in the Circuit Court, whether interlocutory or final. Revision must be sought in the Circuit Court of the district where the proceedings took place which the petitioner asks to have revised, but he is not deprived of a remedy, because the decree is in its nature final. *In re* Reed, 2 N. B. R., 9. Craft's case, 3 N. B. R., 63.

As to the fourth objection, power of Congress to pass the Bankrupt Act is not questioned, and it is equally clear that Congress may create a special tribunal to execute it, or may confer that jurisdiction upon the District and Circuit Courts, created by the Judiciary Act. Decrees of the District Courts are final in the constitutional sense, although they were rendered under an Act of Congress which makes them subject to revision by the Circuit Court, and consequently the right of such revision is not inconsistent with the interest which the opposite party acquires in the decree. Rendered, as the decree is, subject to legal revision in the Circuit Court, no party acquires or can acquire any interest in the decree to defeat the right of such revision. Argument upon this topic is unnecessary, as the final judgments and decrees of every subordinate court are rendered subject to re-examination and revision upon due proceedings in the court of paramount jurisdiction.

As to the fifth objection, unreasonable delay in filing the petition for revision is the next objection. Authority to apply for such a revision is conferred by the Act of Congress, and the act prescribes no limitation as to the time within which the application must be made. Rules and regulations were adopted by the Supreme

Court, but they do not prescribe any such limitation, nor has any such been adopted by this court. Discharge was denied on the 12th of May, 1869, and the petition was filed on the 30th of June in the same year. Special injury is neither alleged nor proved, and the court is of the opinion, in view of all the circumstances, that the petition ought not to be rejected because it was not filed at an earlier day. Until some rule is adopted upon the subject, the court will not deprive the petitioner of a hearing on that ground unless the delay is manifestly unreasonable, or has operated to the prejudice of the respondent.

As to the sixth point, want of jurisdiction is the remaining objection alleged as a cause of demurrer, but the point is without merit, as the jurisdiction is conferred by the Act of Congress in language too plain to be misunderstood.

Neither of the alleged causes of demurrer, therefore, can be sustained, but the petition upon another ground is clearly insufficient. Objections available under a general demurrer are still open to the respondent in this case, as every special demurrer is also a general demurrer, and it is a universal rule that a demurrer, whether special or general, admits only what is well pleaded. All that the petitioner alleges is that he has conformed in all respects to the provisions of the Bankrupt Act, and that he verily believes that he is entitled to a discharge from his debts. Based upon those allegations he states that he is aggrieved by the refusal of the District Court to grant him a certificate to that effect. Appeals in equity suits and in causes of admiralty and maritime jurisdiction vacate the respective decrees in the subordinate courts, and remove the whole record into the court of paramount jurisdiction; but nothing of the kind is done in a proceeding by petition under the 2d Section of the Bankrupt Act.

Allegations merely that a party has conformed to the provisions of the Bankrupt Act, and that he is aggrieved because the prayer of his petition has been refused, is not sufficient. Nor is the allegation by a petitioner that he is aggrieved sufficient, unless it be also alleged in what the error consists, whether

of law, or fact, and the nature of the error should be distinctly stated for the information of the Appellate Court, and as a matter of notice to the opposite party. Appellate Courts, even in appeals, proceed upon the ground that the decree in the subordinate court was correct, and the burden to show error is upon the appellant. (*The Baltimore*, 8 Wall., 378.) Matters of fact, as well as matters of law, may doubtless be revised in the Circuit Court; but it was not the intention of Congress in this form of proceeding to give a party a second trial merely as such, but to secure to him an appellate tribunal for the re-examination and revision of the rulings, orders, and decrees of the District Courts, and for the reversal of the same in case they are found to be erroneous. Demurrer sustained.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

The taking of the property of insolvent traders, by a receiver appointed by a State court, is a taking under legal process, within the meaning of Section 39 of the Bankruptcy Act.

A suspension of payment of his commercial paper by a solvent trader, and non-resumption of such payment within a period of fourteen days, is *per se* fraudulent, and is an act of bankruptcy.

HARDY, BLAKE & Co. *v.* BININGER & Co.

WOODRUFF, C. J.—Abraham Bininger and Abraham B. Clark composed the firm of Bininger & Co., who, for many years, carried on business in this city as merchants and traders.

On the petition of Milton J. Hardy and others, creditors of the firm, they were, on the 22d day of December, 1869, decreed bankrupts, and the respondent Clark has brought into this court for review the proceedings had in the District Court upon that petition, and the decree pronounced thereon.

The petition, as originally filed, alleged as acts of bankruptcy, that the respondents had fraudulently stopped, and had not resumed payment of their commercial paper within a period of fourteen days.

That they, on the 19th of November, 1869, did in substance effect a transfer of all their partnership property to one Daniel H. Hanrahan, under color of the appointment of said Hanrahan to be a receiver of the property of the firm procured by the respondent Clark, in a proceeding instituted in the Superior Court of the city of New York against the respondent Bininger, and was suffered by the said Bininger, with intent to hinder and delay the creditors of the firm.

The respondent, Clark, alone appeared and answered this petition, and by his answer he denied that he, or his said firm, had "committed an act of bankruptcy set forth in the petition or otherwise," and demanded a trial by jury. He alleged in his answer that neither he, nor his said firm, are insolvent; but are, on the contrary, fully able to pay all their just debts and liabilities, and leave a large surplus; and he admits that on the 19th of November, 1869, he commenced an action in the aforesaid court against his copartner, Bininger, praying for a dissolution, an accounting, and for the appointment of a receiver. That such court did appoint the receiver, and he, on the same 19th of November, took possession of the property of the firm in this city, and was in possession when the petition of the creditors was filed. And he further alleged that such petition was filed by collusion between his copartner, Bininger, and their creditors.

On the trial, and upon the examination of the said Clark on his own behalf, the petitioning creditors obtained leave to add further allegations to their petition, by way of amendment. To the granting of such leave the respondent objected and excepted.

By the amendment the petitioners further charged that the respondents, on the 19th of November, 1869, being bankrupt and insolvent, and in contemplation of bankruptcy or insolvency, made a grant, sale, conveyance, and transfer of their property, estate, effects, rights, and credits, to the before-mentioned Hanrahan, with intent thereby to defeat and delay the operation of the Act of Congress (the Bankrupt Act); and did procure and suffer their property to be taken on legal process,

to wit, under and by virtue of the before-mentioned order, appointing Hanrahan receiver, which was procured by the said Clark; and the said receiver was suffered to take possession etc., with the intent, by such disposition of their property, to defeat and delay the operation of the said Act of Congress, and to delay, defraud, and hinder the creditors of the said respondents.

The allegation thus added to the petition the respondent, Clark, answered by a denial, and the said Bininger thereupon appeared in form by his solicitor, but made no answer to the petition.

The trial then proceeded, and at the close of the testimony the judge charged the jury in effect that the petitioning creditors were entitled to a verdict, finding that the respondents, being insolvent, did, on the 19th day of November, 1869, suffer their property to be taken on legal process, with the intent by such disposition of that property, to defeat the operation of the said Act of Congress.

First. In my judgment there was no error in permitting an amendment of the petition. It belongs to courts of justice as the general rule to permit amendments of proceedings before them when they have obtained jurisdiction of the person, and of the subject matter, and it would be strange if the District Court, in the administration of the bankrupt law, should be held incompetent to allow such amendments. The exercise of the power may often be indispensable to the complete attainment of justice. The general orders in bankruptcy made by the Supreme Court contemplate the exercise of this power, and are at least evidence that the Supreme Court deemed that such amendment might lawfully be allowed. (See General Order, 14.)

Here the appellant answered the amended petition and the issue thereby created was tried and determined.

Second. On the question, What constitutes insolvency in a trader, I concur in the views expressed by the District Judge on the trial, and they have singular aptness to the present case. The alleged bankrupts owed a very large sum of money.

They had been struggling for months in a condition of great embarrassment to raise money for the payment of their obligations as they matured. They used means, ordinary and extraordinary, until even such means failed to procure them funds, submitting to the sale of their own paper at an enormous discount for that purpose. It was clear that if they had been able to raise money by continuing to enlarge their liabilities in the future at such a rate in order to meet their payments, the loss would absorb their entire estate. Their real estate in this city was encumbered. They had real estate in Virginia which they had been long endeavoring in vain to dispose of and convert into some available form, but without success, and at length they stopped payment for the want of funds wherewith to pay.

This, in my judgment, constituted insolvency within the meaning of that term, as used in the Bankrupt Law.

On a question of this kind in *Thompson* v. *Thompson et al.* (4 Cush., p. 134), Chief Justice Shaw says: "By the term insolvency, as used in these statutes, we do not understand an absolute inability to pay one's debts at some future time, before the settlement and winding up of a trader's concerns; but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do."

This is the only construction which, I think, is adapted to give effect to the Act of Congress, for the beneficial purposes for which it was designed. Without this a trader's property may be wasted, preferences among creditors be given, and other transfers of his property be effected, wholly inconsistent with the intent of the act. To hold that the probability that an estate judiciously managed, would, at some indefinite time, if sold at prices corresponding with its then present estimated value, produce enough to pay the creditors (if they also would wait, and not force sales by judgments and executions), is to constitute proof of solvency within the meaning of the law, would be neither sensible nor just.

The contrary is also held in *Lee* v. *Kilborn*, 3 Gray, 600; and in *Shore* v. *Eghirey*, 3 Dowl. & R., 218; *Baley* v. *Scofield*, 1 Manning & Granger, p. 350; and the late learned Chancellor of this State, I recollect, used to express and apply the rule above stated by Ch. J. Shaw, and in the report of the charge of the District Judge, as prepared by him for publication in this case, he has cited numerous other cases, from this and other States, to the same effect.

I have no doubt the charge of the court below was correct upon that point. By this, however, I do not mean to say that in every instance, of temporary want of money to pay notes coming to maturity, insolvency is to be inferred. This would be tantamount to saying that whenever a trader suffered a note to go to protest for want of funds in hand wherewith to pay, he can thereupon be adjudged insolvent. This would be an extreme view. Here the debtors were shown to be permanently in that condition, and they could not be delivered therefrom (if at all) except by extraordinary means, out of the course of business, and even extraordinary means had been resorted to and had failed.

Third. The remaining question is whether, the firm being insolvent, it was an act of bankruptcy to apply to the State court to procure the appointment of a receiver, and an order for the delivery of the property of the firm to him, and thereby prevent the operation of the Bankrupt Law upon the property and the administration thereof.

I concur with Judge Blatchford, that the term legal process, as used in the Bankrupt Law, is not to be confined to any particular form of writ, execution, or attachment. An order of sale, to be executed by a Master in Chancery, is in a just and proper sense legal process, though in a technical sense writs, executions, attachments, and the like, running in the name of the people, and addressed to a sheriff or like officer, are usually meant by that term. The writ, mandate, or order of a court taking hold of the property and withdrawing it from the possession and control of the debtor, and from the ordinary reach of creditors for the payment of what is due to them, are each

and either of them within the intent and true meaning of the term legal process, as here employed.

Was this then done with intent to defeat or delay the operation of the Bankrupt Act?

It is entirely clear that its effect was to do both.

In the discussion of this subject had before me, it has been in substance insisted, that proceeding in the State court for winding up the business of a copartnership, settling the accounts between the partners, and the payment of the copartnership debts through a receiver, was the appropriation of the property just as an administration under the Bankrupt Act would appropriate it; and therefore that such a proceeding cannot be said to defeat the operation of the Bankrupt Act; on the contrary, it effectuates the very purpose and object of that act, by paying the creditors without preference.

In the first place, it does absolutely defeat the operation of the Bankrupt Act, by withdrawing the property from any administration under it. Whether some other administration, either through a receiver or a voluntary assignee, is wiser and better or not, whether the end will be the same if those modes are carried into honest and faithful execution or not, the operation of the Bankrupt Act is equally defeated. For, be it observed, the statute does not say with intent to defeat or prevent the *result* which the Bankrupt Law is intended ultimately to accomplish, viz.: the appropriation of the property to the payment of the debt, but it does say with intent to defeat or delay the *operation* of *the act*, withdrawing the property from the reach of that law, and the means which it provides to secure the intended result, does effectually, in respect of that property, *defeat* the *operation* of the act.

The design and purpose of the Bankrupt Law is, that the property of insolvents shall be secured to the creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all its protection against devices to establish false claims, fictitious debts, and illegal or inequitable preferences, which that act provides, and in the summary man-

ner in which the proceedings may be conducted. It is not, therefore, for the debtors, or for the debtors and some of the creditors to say, we can devise a better, or safer, or more economical mode of reaching the same final result. If it were true, it would be only saying that we will resort to an expedient to defeat the Bankrupt Law, and our reason therefor is, that we think our plan is wiser and better than that which Congress has seen fit to prescribe.

But the administration of the property under a receiver in such a suit, does not necessarily accomplish the same result. It is not necessary to enlarge upon this to anticipate all possible differences, but there are various provisions of the Bankrupt Law requiring the surrender of securities as a condition of participation in the bankrupt's estate (Section 20), excluding claims deemed fraudulent under the act (Sections 22 and 39), denying to creditors who have been secured or have taken securities, with reason to believe in the insolvency of the debtor, and for the purpose of obtaining a preference, any share of the estate, and excluding those who may have received security or property as a consideration for not opposing a discharge. (Section 35.) These subjects would find no place in the administration of the estate under the State laws through a receiver. So there are summary means of investigation and inquiry peculiar to the Bankrupt Law not known to the other proceeding.

So the subject of dividends, from time to time, is committed to the determination of creditors (Section 27); certain classes of debts are declared entitled to a preference and to payment in full, in priority to others (Section 28); special modes of determining disputed claims are provided. (Section 6.)

There are doubtless other differences between the administration under the Bankrupt Law, and by a receivership under the State laws; but the above are sufficient to show that the two are wholly inconsistent, and that the latter defeats the former.

To this it seems hardly necessary to add, that the taking of the property by a receiver for administration delays the operation of the act, for it cannot reach the property at all as to the

copartnership debts, and as to individual creditors, if it should turn out that there is anything for them, they must wait the termination of the entire proceedings under the receivership, before the assignee in bankruptcy, appointed for them, can reach it. A proceeding which must pass through all the ordinary forms of litigation, and which is susceptible of almost indefinite protraction through orders, appeals, rehearings, etc., is substituted for the summary proceeding which the Act of Congress provides.

It is claimed by the appellant, that although all this may be true, yet that this necessary result of his action in the matter was not the motive which influenced him; it was not for the purpose of accomplishing this defeat of the operation of the Bankrupt Law, that he proceeded to the appointment of a receiver. Other considerations were the moving cause, and therefore it cannot be said that he intended the results pointed out.

In addition to the reasoning of the District Judge upon this point, and that of Judge Hall in the Northern District, referred to, with *Denny* v. *Dana*, 2 Cush., 160–172; *Beals* v. *Clarke*, 13 Gray, 18–21, it seems unnecessary to say anything. It is no novel doctrine; the debtor must be taken to know the law, and to know the precise legal effect of his act. He did certainly intend the act, and all the legal consequences of the act.

It is easy to confound motive with intent, and that has been done, I think, in the discussion of this case. It was done by the debtor, Clark, in his testimony. No doubt he testified truthfully when he said in substance that he did not procure the appointment of a receiver with the intent to defeat the operation of the Bankrupt Law. I have no doubt he meant by this, that defeating or delaying the operation of the Bankrupt Act, was not the motive which induced him to procure such appointment. He did intend to do the very thing which hinders and defeats the act, and in judgment of law, he knew when he did it that it would have that effect. Knowing the effect he must have intended to produce it, when he voluntarily chose to do the act.

Whatever his motive was he acted voluntarily in choosing, and therefore in intending, all the legal results which would flow from his action in the matter.

There is an alternative view of this subject which would induce me to affirm the decree in this case, if I deemed it doubtful whether a state of insolvency within the meaning of the law existed, and which is so conclusive that a reversal and order for new trial would be useless and therefore improper. It is alluded to in the charge of Judge Blatchford as published. (3 N. B. R., 384.)

If the firm was not insolvent, they had the means of paying their debts. It is now insisted that they were not insolvent on that precise ground.

If, then, they had such means, it was their duty to use them for the purpose of paying their debts, and, being solvent merchants and traders, they committed an act of bankruptcy by stopping payment, and not resuming payment within fourteen days. Of such an act fraud will certainly be the *prima facie* import. And the construction given in many cases to the language of the 39th Section, makes it an act of bankruptcy to suspend and not resume payment within fourteen days, whether the same be fraudulent or not. Without affirming this construction, I incline very decidedly to hold that Congress intended that for a solvent trader to suspend payment and not resume for fourteen days, should be deemed fraudulent as against creditors. Doubtless cases may arise in which solvent traders may be compelled, while acting in the utmost good faith, to suspend payment, and, in consideration thereof, fourteen days are allowed within which they may resume, and thereby repel any inference of fraud. But, within that period, if solvent in the just sense of that term applied to this subject, he must resume, or his continued suspension is, *per se*, fraudulent.

I have retained the papers in this case much longer than I supposed would be necessary when the appeal was submitted. This is due to two causes. 1st. The necessity of being in court for the trial and hearing of other cases at the regular Terms, and the fact that many heavy cases were already on my hands

when this was submitted, which have consumed much time in examination. 2d. Because every moment's reflection tends to confirm the impression I had on the argument that the decree must be affirmed, and I desired to reflect fully upon the questions presented. This made it certain that the delay would work no injury to the party seeking a reversal.

I have only to add that the motive of petitioners in prosecuting the petition, or the co-operation of the copartner Bininger, or his motive therefor, can have no possible effect in determining the quality of the acts alleged to be acts of bankruptcy, or the legal consequence of such acts.

The rejection of evidence tending to show collusion between Bininger and the petitioning creditors, was not erroneous. However fully established, the decree must have followed as the right of the creditors. If the design was to show a purpose to administer the bankrupt's estate so as to defraud Clark, his copartner, that design appertains to the future, the means are abundant to protect him against any such fraud, and the court and the law are competent in adequacy and power to see that in execution of the law full justice and protection are awarded to all who are interested.

The decree must be affirmed.

C. F. Sandford and *M. Compton*, for appellant, Clark.

F. N. Bangs, for petitioning creditors, Hardy, Blake & Co.

UNITED STATES DISTRICT COURT—TENNESSEE.

Where a bankrupt applies for his discharge, his assets not being equal to fifty per cent. of the claims proved against his estate, which were contracted since January 1, 1869,

Held, that bankrupt shall be discharged from all debts provable against his estate which were contracted prior to January 1, 1869.

Discharge does not bar debts contracted since January 1, 1869, which have not been proved.

In re Seay.

CERTIFICATE OF THE REGISTER.

The original petition by the creditor, The Traders' Bank, was

filed June 24th, 1869, and the debtor was adjudged bankrupt on the 19th day of November, 1869.

On the 5th day of November, 1870, the meeting for hearing on petition for discharge was held, at which bankrupt attended and passed his last examination. There was no appearance or opposition by any creditor, and the assignee reported that he had neither received nor paid any moneys on account of the estate, and that the assets were not equal to fifty per cent. of the claims proved against said estate, contracted since January 1st, 1869, on which bankrupt was liable as principal debtor.

It appeared that three proofs of debts on which bankrupt was liable, as principal debtor, had been filed, two of which had been contracted before January 1st, 1869, and the other (or part of it) had been contracted since that date. No written assent was filed in the case. I certified that there was no opposition, and that it appeared to me that the bankrupt had in all things conformed to his duty under the act, and to all the requirements thereof except the requirement contained in the second clause of Section 33, as amended by acts of July 27th, 1868, and July 14th, 1870.

The question is, under the above state of facts, whether a discharge shall be granted to the bankrupt, and if granted, what must be its form and its effect upon his debts contracted both prior and subsequent to January 1st, 1869. The clause of Section 33 referred to, as amended by act of July 27th, 1868, is as follows:

"In all proceedings in bankruptcy commenced after the 1st day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge."

Thus the law stood at the time of the commencement of the proceedings in this case. But before the hearing of the appli-

cation for discharge, the act of July 14th, 1870, was passed, which is as follows:

"*Be it enacted, etc.*, That the provisions of the second clause of the 33d Section of said act, as amended by the 1st Section of an act in amendment thereof, approved July 27th, 1868, shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first day of January, 1869."

Had not the last amendment been passed it is evident that no discharge could have been granted this bankrupt, as the obstacle to his discharge (and the only obstacle thereto) would have been the provision of said second clause, the obvious application and sole object of which was to prevent such discharge, except upon certain conditions respecting assets.

One of the two great objects to be effected by the Bankrupt Act is the discharge of a debtor who has fully complied with the requirements of the act, and it would seem to follow that if a particular restriction upon the right of a debtor to a discharge has been removed, then the right is immediately resumed to the full extent that it is unaffected by any remaining restriction.

The time when this restrictive clause could have any operative force would be on the day of the hearing of the application for discharge, and in this case on that day there was no restriction on the bankrupt's right to a discharge, except with regard to his debts contracted subsequent to January 1st, 1869. Upon this state of facts I think a discharge should be issued to the bankrupt, modified to read as follows:

"*Whereas*, George W. Seay has been duly adjudged a bankrupt under the Act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf *respecting his debts contracted prior to January* 1st, 1869, it is therefore ordered by the court that said George W. Seay be forever discharged from all debts and claims which by said act are made provable against his estate, *which were contracted prior to January* 1st, 1869, and which existed on the 24th day

of June, 1869, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy."

The question whether the discharge should also bar those debts contracted since January 1st, 1869, which *have not been proved*, I think must be answered in the negative for the following reason: By the terms of the last amendment it seems that the restrictive clause is left to operate with the same force and effect upon the debts contracted since January 1st, 1869, as it previously did upon all debts, whenever contracted. Since, therefore, before the last amendment, no discharge at all could have been issued (even to bar debts not proved), if the assets did not pay fifty per centum of those which were proved, and the last amendment only modifies the action of the court respecting the debts contracted prior to January 1st, 1869, it would seem to follow that there is no authority given to grant a discharge for *any* debts contracted subsequent to that date.

ALEX. S. BRADLEY, *Register.*

TRIGG, J.—I have examined the questions submitted in the foregoing certificate from Mr. Register Bradley, and I fully approve the opinion which he has given, and it is ordered that a discharge issue to the bankrupt in accordance therewith.

UNITED STATES CIRCUIT COURT—MISSOURI.

Unless Congress has otherwise provided, State Statutes of Limitation are applied to controversies in the courts of the United States.

The fraud which in equity will prevent the running of the Statute of Limitations, is that which is secret or concealed, as distinguished from that which is open, visible, or known, and a secret or concealed fraud is in equity a fraudulent concealment of the cause of action.

Even in cases of fraud, the statute will in equity begin to run as against the plaintiff when he has knowledge or information of facts which reasonably creates the belief that the transfer is fraudulent and can be proved to be so; and if, under all the circumstances, the plaintiff has been guilty of negligence in discovering or attacking the fraud, the statute will begin to operate against him from the period his laches commenced.

What, in the view of a Court of Equity, will be regarded as a *discovery* of the fraud considered.

Martin, Assignee, etc., v. Smith et al.

The statute of Missouri, which provides that "actions for relief on the ground of fraud must be brought within five years after the cause of action accrued, but the cause of action shall be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud," construed and considered as in substance enacting the equity rule on the same subject, and fixing the period of limitation.

In an action by an assignee in bankruptcy of a fraudulent debtor, where the fraud was *continuous*, and the debtor remained down to the time suit was brought, the real owner of the property sought to be recovered and in possession of it: *Held*, that the statute did not bar the suit, even though the initial fraudulent transaction took place more than five years before suit was commenced.

MARTIN, *Assignee, etc., v.* SMITH *et al.*

THIS was a bill in equity filed originally in the District Court by Martin, as assignee in bankruptcy of one Edward K. Woodward, to recover certain property from the defendants.

Prior to February, 1861, Woodward had been a merchant in St. Louis, doing business in his own name and in the usual way. In the fall of 1860, however, he became much embarrassed, and, in fact, insolvent. He endeavored late in 1860, first through the defendant, Gray, and subsequently through the defendant, Smith, to effect a compromise with his eastern creditors, but could not succeed. The defendant, Smith, is a brother-in-law of Woodward, is by profession an attorney-at-law, and resides in Hartford, Connecticut.

On the 8th of December, 1860, Woodward, at St. Louis, wrote to Smith, at Hartford, informing him that suits were already begun against him, entreating him to go to New York and Philadelphia to see if he could not effect the desired compromise and extension. Woodward's letter then continues: "Make the best arrangement possible, except cash down or security; and if you cannot arrange with them, come right on here and buy me out on terms that you will be safe in, and such as they will be forced to accept our terms. One suit is within the justice's jurisdiction, and judgment will be rendered on the 10th, so I want something done previous to that time. The trial of the other two is set for the 17th. I shall call for a witness who, I don't believe, will be got at the time, and the probability is that they will be continued for the present. My

real estate is in a precarious condition, and unless you can get those creditors into the arrangement, so as to give me time to protect it, everything will be swallowed up, unless you can come out, etc. * * * I shall be anxious to hear from you."

Smith failed to make any compromise, but he effected a purchase of certain claims against Woodward at twenty-five cents on the dollar; went to St. Louis February, 1861, and on the 5th of that month purchased of Woodward his stock of merchandise, for the express consideration of eleven thousand three hundred and sixty dollars.

This sum was paid by turning over to Woodward, at their face value, the claims which Smith had purchased a few days before at one-fourth of that sum; by assuming amounts due for the rent of the store building, and by his three notes to Woodward for nine hundred and nineteen dollars and sixty-four cents each.

These notes were soon afterwards paid to Woodward in claims which Smith purchased of Woodward's creditors at twenty-five cents on the dollar, and then sent to St. Louis and turned over to Woodward at their par or nominal value, and the notes for rent were paid out of proceeds of goods sold from the store.

After the sale of the goods to Smith, the store was operated in the name of Bailey, agent, for over a year, then in the name of Bell, agent, until March, 1864, when a limited partnership was formed under the statute of Missouri, the articles being executed by the defendants, Gray and Smith—the former being the general and the latter the special partner. This limited partnership was, by its terms, to continue for three years from March 1st, 1864, and the business was to be conducted in the name of Gray. When the three years expired, the same arrangement was continued, and the store was being thus conducted in December, 1867, when Woodward was, on his own petition, adjudicated a bankrupt, and in July, 1868, when the present suit was commenced.

On the 22d April, 1861, Woodward, without beforehand consulting Smith, made to him, subject to certain incumbrances,

a deed of all his real estate, and this deed was placed on record in February, 1862. Among other parcels was the house in which Woodward then lived, and where he has ever since resided, without paying rent therefor, and the taxes on which have been paid by Woodward out of money from the store. Certain parcels were redeemed by Woodward's direction from judicial sales, by money likewise taken from the store, and titles made in the name of Smith, of which he was subsequently advised. From the store also, and under Woodward's management, incumbrances have been paid off, and the items have been assigned to Smith, who holds them against the property. (See *Robb* v. *Woodward*, Sup. Ct. Mo., March term, 1870.)

Soon after the purchase of the goods, Smith returned to Connecticut, leaving the store in the nominal possession of one Bailey, as his agent, and taking with him of the moneys in the store the sum of thirty-seven dollars, to pay his expenses. In the professed capacity of clerk for Smith, Woodward remained in the store from the time of his sale to Smith, in February, 1861, down to the time of the filing of the present bill, and the evidence showed that, in fact, he managed there as before, and that Bailey and Bell, and even Gray, acted under his direction.

The bill made Smith, Woodward, and Gray defendants, and set out at great length all of the above-mentioned facts, with many others, and charged a fraudulent combination throughout all these transactions between Smith and Woodward, to defraud the creditors of the latter; that the sale of the goods was colorable and fraudulent; that in reality Woodward was the real owner during all the time the business was conducted in the name of "Bailey, agent," and in the name of "Bell, agent," and in the name of Gray; that the real partner of Gray is Woodward, and not Smith; that Smith has been refunded out of the sales from the store all moneys which he has expended in the purchase of claims against Woodward, or for advances to purchase goods.

The bill also alleged that Woodward, in pursuance of the

original fraudulent design, procured to be effected the limited partnership of Gray, who was to contribute six thousand dollars in cash against the stock, which was put at twelve thousand dollars, and Gray was to be interested in one-third of the profits and Woodward in two-thirds, but to carry out the fraud Smith's name was used in the articles, and not Woodward's. The bill stated that large profits had been made; that the stock increased in value; that Woodward, at the date of his bankruptcy, was entitled to a large sum from the firm; that Gray had withdrawn large sums and amounts, and was indebted to his copartner, Woodward, therefor; that defendants Smith, and Gray had a large amount of property belonging to the firm, which they had sold since the bankruptcy of Woodward was declared.

The bill also stated that the assignee, after his appointment in January, 1868, first discovered the frauds aforesaid; that claims to the amount of about thirteen thousand dollars had been established against the estate of Woodward, by various creditors named, none of whom, it is averred, knew of the frauds complained of until January 3d, 1867.

It was also averred that Smith, and Gray denied that Woodward had any interest in the firm, and it was stated that the latter had falsely returned to the Bankrupt Court that he had no interest therein.

The prayer of the bill was that an account be taken of all the said partnership dealings between the defendants; that what should be found due from Smith, and Gray to the firm be decreed to be paid to the complainant as assignee; that the respective rights of the defendants in the firm property, at the date of Woodward's bankruptcy, be determined; that a receiver be appointed to collect the debts and take charge of the property of the partnership; that the property be sold and converted into money, and for general relief.

The defendants severally answered, denying the frauds charged against them, and also denying that Woodward ever had any interest in the limited partnership mentioned. Smith, in his answer, specially pleaded the statute of limitations of the

State of Missouri, alleging that the purchase of the goods, charged in the bill to be fraudulent, was made February 5, 1861, and that no suit to set aside said sale as fraudulent as to creditors was brought by or for them within five years after the sale was made and possession taken, wherefore the creditors and the assignee are barred of such suit by the statute of November 22, 1855, referred to in the opinion of the court.

Replications were filed; a large amount of testimony was taken, and on final hearing the bill was dismissed, whereupon the assignee appealed to this court.

Lee & Webster, and *Cline, Jameson & Day*, for the assignee.

Whittlesey & Hamilton, for the defendants.

DILLON, C. J.—In the argument at the bar counsel differed, not indeed respecting the general nature of the bill, but upon the point whether in the relief sought it embraced the real estate conveyed by the bankrupt to the respondent, Smith, as well as the personal property or the interest in the copartnership firm therein mentioned.

The point is important, for the limitation as to real actions is ten years, and as to personal actions five years. The present bill was exhibited more than five, but within ten years after the sale of the goods and the conveyance of the real property.

If the averments of the bill and the prayer for relief be carefully examined, it is plain, beyond controversy, that all that is alleged respecting the real estate is in the nature of inducement, to show the character of the dealings between Woodward and Smith, and to make probable the *gravamen* of complaint.

It is extremely important that we shall obtain a correct notion of the real nature, scope, and purpose of the bill; for upon the view we take of this will depend, as we shall presently see, the question whether the statute of limitations bars the relief sought.

The bill is not one to set aside as fraudulent the sale of the specific stock of goods made in February, 1861, or to recover their value as property to which the creditors of the bankrupt are entitled. This sale is indeed set out in the bill, and is al-

leged therein to have been fraudulent, but it is set forth only as inducement, as the initial transaction of a fraudulent conspiracy and scheme, which ended, not with the consummation of that particular sale, but which continued in existence and was flagrant down to the period when Woodward was adjudicated a bankrupt, and when this suit was commenced.

The plea of the statute sets out this sale made in February, 1861, and then alleges that the suit is barred by reason of the lapse of more than five years before it was commenced. The plea misconceives the nature and purpose of the bill, and proceeds upon the mistaken idea that it is brought simply to impeach the original sale of the stock of goods made more than seven years before.

The true view of the bill is, that it charges that the real parties in interest in the business of the limited partnership carried on in the name of the defendant, Gray, are Woodward, and Gray, and not Smith, and Gray, as appears on the face of the written and recorded articles, and as given out by all three of them to creditors and the world, and consequently that the interest of Woodward in this business and in the assets of the firm belongs to the assignee for the benefit of his creditors, and it is this interest which the assignee by the present suit is seeking to recover.

The suit is a personal, as distinguished from a real action, and hence the ordinary limitation period is five years, and not ten, from the time when the cause of action accrued. *Robb* v. *Woodward*, Sup. Ct. Mo., T., 1870.

In the case just cited the Supreme Court of Missouri decided upon the proof before it, that the conveyance of the real estate by Woodward to Smith was fraudulent, and of the correctness of that judgment on this point there can be no question. That case had no relation to the personal property or partnership interests now in controversy, and there was no question as to when the fraud was discovered; and hence what is said in the opinion on these subjects by way of argument by the learned judge who delivered it, is not to be taken as points decided by the court.

Upon the proofs in the record now before us we consider the fraudulent conspiracy between Woodward, and Smith, charged in the bill, to be so clear as not to admit of fair debate, and that so far from ending with the purchase of the goods in 1861, it continued down to the time this bill was brought. The evidence is voluminous, and it would require too much time without any resulting benefits, to enter upon a detailed or analytical statement and discussion of it.

Suffice it to say, that it firmly establishes that Woodward designed to place the property beyond the reach of his creditors; that Smith made a colorable purchase of the goods to enable the debtor to effect his purpose; that apparently he has received from the sale of the goods in the store all sums which he expended in buying claims against Smith or otherwise; that Woodward was all the time the real, while Smith was only the nominal party in interest. That the purchase of the stock of goods by Smith was fraudulent is very faintly, if at all, denied by counsel. At all events, they have placed the stress of their defense upon the statute of limitations, and it was upon this ground, undoubtedly, that the bill was dismissed by the learned judge, whose decree we are called upon to review.

The question involved is alike interesting and important. To determine it, we must first look at the statute and ascertain its meaning and purpose, and then at the special character of the case in hand, and see whether it is one where the statute will operate to bar the relief sought. In a suit of this kind the assignee is clothed with all the rights of creditors (whom, indeed, he represents) to impeach transfers of property made by their debtor or colorably held by others in fraud of their rights.

The code of Missouri declares that "there shall be but one action in the State for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action." 2 Wagner's Stat., 991, Section 1.

The statute of limitations (Section 8), enacts that "civil actions other than those for the recovery of real property can

only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued:"

"SEC. 10. Within five years; fifth, an action for relief on the ground of fraud—the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud." *Id.*, 918.

Unless Congress has otherwise provided, State statutes of limitation are applied to controversies in the courts of the United States with the same effect as they would be if the controversy were pending in the courts of the State.

It is necessary, therefore, to construe the 10th Section of the statute of limitations above quoted, in order to determine its effect upon the rights of the parties to the present suit.

We have had called to our attention no decision of the highest court of the State construing this statute in respect to the *precise* questions which we are now to decide. The legitimate office of construction is to ascertain the legislative will or purpose, and to this end it is not only proper, but often necessary, to look not simply at the language of the particular enactment under consideration, but also at the subject matter of it, in the light which the former law, or general principles, shed upon it.

Formerly, in the State of Missouri, the forms of action and modes of procedure were as at common law, with a distinct equity jurisdiction. At that time the statutes of limitations were, in substance, the same as 21 Jac., 1. c., 16, and professed to apply only to certain specified actions at law. Rev. Stat. 1845, p. 373, 374.

Equity at this time applied, of course, these statutes according to the settled doctrines of that court.

The code subsequently enacted provided, as we have seen, that there should be but "one form of action—a civil action;" and the Legislature made the statute of limitations apply to all civil actions; which statute would probably be held, in this State, as it has been in others under legislation of a similar character, to embrace equitable as well as legal causes of action so far as they fall within the terms of the act. That is, the

limitations as to all actions therein mentioned and provided for, applies equally to causes of action formerly cognizable either in equity or at law. *Newman* v. *De Lorimer*, 19 Iowa, 244; *Johnson* v. *Hopkins*, *Id.*, 49; *McNair* v. *Lott*, 25 Mo., 182.

In this view it is easy to perceive why the Legislature adopted the 10th Section of the act concerning the limitation in cases of fraud. If the provision had been *merely* that "actions for relief on the ground of fraud should be commenced within five years after the cause of action accrued," it is extremely probable that the courts would have been obliged to have held that the statute would begin to run from the period when the fraud was consummated, and not as under the well-known equity rule, from the period when the fraud was or should have been discovered. To remove all doubt on the point, and to preserve the equity doctrine on the subject, the Legislature added the words: "The cause of action in such case shall not be deemed to have accrued *until the discovery by the aggrieved party* * * * *of the facts constituting the fraud.*"

In my judgment the Legislature, by this provision, in substance re-enacted the doctrine which had been established by courts of equity, as to the effect of fraud in preventing the running or operation of Statutes of Limitation.

If this be so, it becomes important to examine the nature and grounds of the equity doctrine, the better to understand the meaning of the statute.

Mr. Justice Story states the doctrine of equity thus: "If a party has perpetrated a fraud, which has not been discovered until the statutable bar may apply to it at law, courts of equity will interfere to remove the bar out of the way of the injured party." (Eq. Jurisp., Section 1521.) "The question often arises in cases of fraud or mistake, * * under what circumstances and at what time the bar of the statute begins to run." * * "In cases of fraud and mistake, it will begin to run," he says, "from the time of the discovery of such fraud or mistake, and not before." *Id.*, Section 1521, a.

This distinguished jurist, on the circuit, in the Supreme

Court, and in the preparation of his commentaries, had frequent occasion thoroughly to explore this subject, and his opinions upon it are entitled to great consideration, though it is to be regretted that he does not go more into detail. In his commentaries he does not discuss the nature of the fraud which in equity will prevent the bar of the statute from running; nor what, in the view of that court, will amount to a discovery of the fraud. An examination of these topics, as well as of the ground and reason of the rule itself, is essential to a thorough understanding of the subject, and is required by the circumstances of the cause now before us for determination.

As to the kind of fraud contemplated: Some judges have said that the fraud which will avoid the effect of the Statute of Limitations, must be positive and actual fraud. But this is a point which we are not now required to notice, for in this case the fraud was actual and positive.

It seems to me quite clear, both from an examination of the authorities and the nature of the case, that the fraud which shall operate to displace the statute or prevent its application, is secret or concealed fraud, a fraud unknown to be such to the party injured thereby. In a leading case on the subject Lord Rosendale said: "That as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the Statute of Limitations shall not operate; because, until discovery, the title to avoid it does not completely arise, etc. Pending the concealment of the fraud, the statute ought not, in conscience, to run," etc. *Hovendon* v. *Lord Annesly*, 2 Sch. & Lef., 624.

That the fraud must be secret or concealed, not openly known and visible, to prevent the bar of the statute from running, is distinctly asserted or assumed in many cases. *Troup* v. *Smith*, 20 John R., 33, 47, 48, per Spencer, C. J.; *Stearns* v. *Paige*, 7 How., 819, 829; *Carr* v. *Hilton*, 1 Curt., C. C. R., 230; s. c. *Id.*, 399; *McLain* v. *Ferrell*, 1 Swan, Tenn., 48; *Bucknor* v. *Calcote*, 28 Mississ., 432; *Wilson* v. *Joy*, 32 *Id.*, 233; *Cook* v. *Lindsey*, 34 *Id.*, 451; *Young* v. *Cook*, 30 *Id.*, 320; *Campbell* v. *Vining*, 25 Ills., 525; *Farnum* v. *Brooks*, 9 Peck, 212; *Pha-*

len v. *Clark*, 18 Conn., 421; *Moore* v. *Greene*, 5 Curt., C. C. R., 202; affirmed 19 How., 69, 72; Angell on Limit., C. 18; Sugden on Vend., 612 pl., 17.

It is declared, indeed, that no case can be found where the statute has been avoided, at law or in equity, unless on the ground of fraudulent concealment on the defendant's part. *Bishop* v. *Little*, 3 Greenl., Me., 405.

This subject was discussed by a truly great judge in the case of *Carr* v. *Hilton*, above mentioned, which was a suit in equity, by an assignee in bankruptcy, to recover of the defendant lands fraudulently conveyed to him by the bankrupt. The defendant relied on the Statute of Limitations found in the Bankrupt Act of 1841. In holding that the cause of action did not accrue to the assignee till the fraud was discovered, Curtis, J., says: "Statutes of Limitations do not run in cases of fraud while it is secret. It is objected that the bill does not contain any averment that the case of action was fraudulently concealed. But it does state a cause of secret fraud, and it would be difficult to distinguish this from fraudulent concealment. A secret, or what is the same thing, concealed fraud, is a fraudulent concealment of the cause of action." This I assent to as a perspicuous and accurate statement of the law on this point.

As to what amounts to a discovery within the meaning of the equity rule: This is regarded as so important that it must, with all necessary circumstances be distinctly stated in the bill.

Grier, J., speaking of this point when delivering the opinion of the Supreme Court, says: "Especially must there be a distinct allegation as to the time when the fraud was discovered, and what the discovery is, so that the court may see whether, by the exercise of ordinary diligence, it might not have been before made." *Carr* v. *Hilton*, 1 Curt., C. C. R., 390; *Fisher* v. *Boody*, *Id.*, 206; *Moore* v. *Green*, *Id.*, 202, 206; s. c., 19 How., 69. And the bill, it has even been said, should negative laches in not making the discovery. *Mayne* v. *Griswold*, 3 Sanf., 463; *Field* v. *Wilson*, 6 B. Mon., 479.

The question recurs, however, *What is discovery?* I answer,

notice of the fraud; or, in the language of the Missouri statute, of "the facts constituting the fraud." What is notice? In answering this, Judge Curtis, in *Carr* v. *Hilton*, 1 Curtis, C. C. R., 390, 393, quotes and approves the following doctrine laid down in *Kennedy* v. *Green*, 3 Mylne & Keen, 719, 721, 722: "It is a well established principle that whatever is notice enough to excite attention and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

The cases quite generally hold that the statute will run and fraud will not avoid it, if the plaintiff, under the circumstances, has been guilty of negligence in discovering or attacking it: *Smith* v. *Talbot*, 18 Texas, 775; *McDonald* v. *McGuire*, 8 Id., 361, 370; *Campbell* v. *Vining*, 25 Ill., 525; *Ferris* v. *Henderson*, 12 Penn. St., 49; *Johnson* v. *Johnson*, 5 Ala. (N. S.), 90; *Bucknor* v. *Calcote*, 28 Miss., 432; *Edmonds* v. *Goodwin*, 28 Geo., 38; *Lott* v. *DeGraffenreid*, 10 Rich. (Eq.), 348; *Farnum* v. *Brooks*, 9 Peck., 212; *Way* v. *Cutting*, 20 N. H., 187; *Stearns* v. *Paige*, 7 How., 819, 829; *Edwards* v. *Gibbs*, 31 Miss.; Angell on Lim., Sec. 183, and note, Sec. 190; *Nudd* v. *Hamblin*, 8 Allen (Mass.), 130, and cases cited.

It is easy, it seems to me, to press this principle too far, and I prefer the test or doctrine approved and applied by Judge Curtis, *i. e.*, holding the plaintiff to know all that the information he is possessed of makes it his duty, as a reasonable man, ordinarily vigilant in protecting his own interests, to know or to learn.

The language of the statute is "discovery by the aggrieved party at any time within ten years of the facts constituting the fraud." This is the same, in my opinion, as if it read discovery of the fraud. If a party knows the facts constituting the fraud, he knows the transaction to be fraudulent. It is not enough simply that he is aware of the fact of the transfer, but he must know "the facts" which make that transfer fraudulent.

In *Godbalt* v. *Lambert*, 8 Rich. (Eq.), 155, 164, where an alleged fraudulent deed was placed on record, and it was contended that creditors were bound to know its character, the Chancellor very sensibly observed, "registry of a deed is only implied notice of its contents, and not of any fraud that may be perpetrated in its execution." I cannot assent to the correctness of the remark in the case of *Lott* v. *De Graffenreid*, 10 *Id.*, 346, that the registry of a deed is sufficient notice to creditors, and the statute of limitation begins to run from that period, even though the deed be fraudulent.

There is one peculiarity of the Missouri statute which ought not to be passed without notice, and that is the clause which renders it necessary to make the discovery of the fraud within ten years. The language of the section was evidently copied from the New York code, which is literally the same as the Missouri statute, except that in New York the words "at any time within ten years" are omitted. Howard's N. Y. code, Section 91. The same words are omitted likewise from the Ohio code, the Nebraska code (St., 1857, p. 395), the Kansas code (St., 1868, p. 633), the Minnesota code (St., 1866, p. 451), and the Iowa code (Rev., 1860, Section 2741). All these statutes enact that in actions for relief on the ground of fraud, "the cause of action shall not be deemed to accrue until the discovery of the fraud," or of the "facts constituting the fraud." Words limiting the time when the discovery shall be made are, so far as I have observed, peculiar to the legislation of Missouri.

Lord Erskine, in one case, declared that "no length of time can prevent the unkennelling of a fraud;" Forrester, 66. Lord Northington said, with emphasis, in *Alden* v. *Gregory*, 2 Eden, 285, "never, while I sit here, will delay purge a fraud." These expressions of decisive indignation against fraud are natural enough indeed, but if taken literally they lay down a doctrine which, if fully carried out, would be at war with the peace and repose of society, on which rests the wise policy of all limitation statutes. Hence, the provision very generally adopted in the legislation of the States that the statute will begin to run

from the period when the fraud is discovered, and hence, also, the additional provision of the Missouri statute, which seems to require the discovery to be made within ten years from the consummation of the fraud.

The effect of this provision is, not to declare that the plaintiff cannot for a period of ten years be guilty of laches, or that he may, for full ten years, shut his eyes to facts which it would otherwise be his duty to notice and act upon, but its effect, rather, is to require him, at his peril, to make the discovery within the prescribed period. I do doubt that the provision is wise in conception, and will prove salutary in operation.

The reason or ground of this rule in equity is quite plain. Applying, as this rule does, only to cases of secret or concealed, as distinguished from known fraud, as before explained, I have no doubt that Lord Redesdale gives the true reason for its adoption by equity, viz.: that it is against conscience for a party to avail himself of the statute when by his own fraud he has prevented the other party from knowing or asserting his rights within the period prescribed by the statutes of limitation: 2 Sch. and Lef., 634; *Troup* v. *Smith*, 20 John., 33, 47, 48.

This is entirely consistent with the exposition of the rationale of the doctrine by Baron Alderson, in *Brookshank* v. *Smith*, 2 Young & Coll., 68: "In cases of fraud courts of equity hold that the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this courts of equity differ from courts of law, which are absolutely bound by the words of the statute:" *Imp. Gas., etc.*, v. *London Gas Light Co.*, 26 Eng. Law and Eq., 425.

So in cases under the Missouri statute, the limitation begins to run as against the plaintiff, when he has knowledge of facts which would have impressed a reasonable man with the belief that the transaction was fraudulent, for from that time his laches begins, if his debt is mature.

Judge Curtis, in the case before cited, speaking of the ground of the rule that fraud avoids the statute, says: "In my judgment the most reasonable and sensible ground is that, substan-

tially, the title to avoid it does not arise until the fraud is known." 1 Curt., C. C. R., 230. This is adopting the view of Lord Talbot, Cas. temp. Talbot, 63, and it has also the sanction of other eminent judges.

The title to avoid the fraudulent transaction does ordinarily arise as soon as the fraud is perpetrated (26 Eng. Law and Eq., 425, J. J. Marsh, 445; 33 Mississ., 233; 20 Johns., 33, supra); but *substantially* it does not, because the fraud is not known, and hence the fraudulent wrongdoer is estopped, while the aggrieved party is kept ignorant of his rights, from setting up against him the bar of the statute.

But this assumes that the creditor's debt is one which is due, so that he is in law enabled effectively to assert his rights, and therefore properly chargeable with negligence if he fails, for the prescribed period, to do so.

There may be some question as to the scope of the language of the statute, "an action for relief on the ground of fraud;" but there is no doubt that a bill in equity by a creditor to set aside a fraudulent conveyance or transfer of property by his debtor, is such an action. The cases before cited will show that this point has never been disputed.

Having thus seen that the present suit is one which falls within the aforementioned 10th Section of the Limitation Act; that the fraud contemplated by that act is fraud, which is secret or concealed, as distinguished from that which is open and known; and having also seen what, in the view of a court of equity, is regarded as a discovery of the fraud, so that thenceforth the laches of the plaintiff and the running of the statute alike begin; that the ten years limitation in the section is not to be construed as sanctioning negligence or the shutting of eyes to information of the fraud; and having also seen the reason, or policy and purpose of this legislation, we are now prepared to apply the statute, as thus expounded to the facts of the present cause. This, in view of the length of this opinion already, we must do briefly.

The facts constituting fraud in the transfer of property by a debtor, are, in some cases, concealed or secret, and in some vis-

ible or open. The fraud in the sale of the stock of goods to Smith, in February, 1861, in view of the relationship of the parties, of facts known to a great many creditors as to Woodward's condition, and Smith's knowledge of it, and the manner in which Woodward was still allowed to exercise control over the property, was such, in our judgment, that any creditor might, if ordinarily vigilant, have discovered it within five years from the sale.

If the present was a bill simply to have declared fraudulent the sale made in 1861, we should have to hold, taking all the circumstances together, that the fraud was not so concealed or secret but the creditors, using due diligence, might and should have discovered it; and, if their debts were due, they could and should have assailed it within the five years. Undoubtedly, it was this view of the case which was taken in the court below.

But, as we have before shown, such is not the case made by the bill, and such is not the relief sought. The question before the court is, whether, upon the proofs, Woodward has any interest in the limited partnership carried on in the name of the respondent, Gray; whether Smith, or Woodward is the party really owning the interest other than that owned by Gray.

Upon this subject we entertain a very decided conviction, and that is, that Smith has no real and substantial interest therein; has apparently no money invested in it beyond what he has received; that his pretence of ownership is purely sham; a device to keep at bay the creditors of Woodward; and that the latter, though held out simply to be a clerk, is the owner of the interest in the firm, other than that held by Gray. Since 1861, Woodward has, in effect, been managing the store the same as before, giving to it his time, attention, and skill; to these, and the profits which are their product, his creditors, and not Smith, are best entitled.

Equity looks at substance and not form. It penetrates beyond externals to the substance of things; and it accounts as nothing, and delights to brush away barricades of written articles and formal documents, when satisfied that they have been devised to conceal or protect fraud.

The fraud in the case before us, as we view it, ended not with the purchase of the goods in 1861, but continued down to the time this bill was filed. The case is different from what it would be if the sale of the goods had been the only transaction, and Smith had taken exclusive possession of them, and held or sold them as his own, more than five years before his purchase was attached by creditors.

It is our opinion that the fraud, commenced in 1861, has been continued down to the time this suit was brought; that in equity, as respects creditors, the interest in the firm and its business is owned by Woodward and not by Smith; that the latter holds that interest, whatever it may be, in secret trust for the former, and hence the statute of limitations cannot avail to prevent that interest from being ascertained and subjected to the claims of creditors of the bankrupt.

It is not necessary in this view to consider the point made that at all events the statute could not bar the relief sought, at least not entirely, because the debts of some of the creditors of Woodward did not fall due until 1867.

We now decide two points only: First, That Woodward has an interest in the property and assets of the firm business carried on in the name of Gray, which may be reached by the assignee in the present suit. Second, That the statute of limitation, pleaded by the respondent, Smith, is no bar to the relief sought.

The decree of the District Court is reversed.

Krekel, J., concurred.

UNITED STATES CIRCUIT COURT—VIRGINIA.

1. *Held*, that interest should not be allowed for the period during which intercourse between the parties, and between the parts of the country in which they respectively lived, was suspended by our late civil war.
2. That the proclamation declaring the blockade of the ports of the insurgent States, must be regarded as the first formal recognition of the existence of civil war by the National Government.
3. That the period of its termination has not been so definitely ascertained; that it was declared by the President and Congress to have ended Aug-

ust 2, 1866, which date has been recognized by the Supreme Court in various cases, but in a case involving the effect to be given to the statute of limitations the court declined fixing any date as applicable to all cases. In this case, as applicable to Virginia, the court fixed the date on the 26th of May, 1865.

4. That in computing interest, the time from April 19, 1861, to May 26, 1865, should be excluded.

BIGLER *v.* WALLER

CHASE, C. J.—The general principles on which this case must be adjudicated were announced at the last term. But a suit commenced by the defendant Waller in a State court of New York against the plaintiff Bigler, prior to the bringing of the present suit in this court, was then pending and undetermined, and we did not think proper until that suit should be disposed of to proceed to final decree here.

That suit, however, has been terminated by discontinuance, and there is no reason why a final disposition of the litigation should not now be made.

The principles stated at the last term require that all the exceptions taken to the report of Commissioner Cahoon be sustained, except so far as the general views now to be stated may affect this general order.

It is not denied that, on the 10th of May, 1860, the sum of thirteen thousand dollars was due from the plaintiff Bigler to the defendant Waller as a balance of the purchase-money agreed to be paid for the estate sold to the former by the latter.

The questions to be considered are these:

First. By what rule shall interest be computed on this balance? In other words, shall interest be allowed for the period during which intercourse between the parties and between the parts of the country in which they respectively lived, was suspended by the civil war?

In a case decided by the Circuit Court of the United States, for the district of North Carolina, it was held that interest did cease during the recent civil war in consequence of the residence of the parties to the contract in the hostile sections of the country. Since that decision was made, it has been held by the Supreme Court of the United States, in the case of

Hanger v. *Abbott*, 6 Wall., 532, that the statute of limitation was suspended in the insurgent States as to non-residents having cause of action against residents by the civil war. And in the case of *Ward* v. *Smith*, 7 Wall., 452, while it was held, that under the circumstances of that particular case interest did not cease, the opinion of the court was put upon circumstances creating an exception to the general rule, that interest does not accrue during war between citizens or subjects of belligerent States. The general rule was neither affirmed nor denied; but it may not unreasonably be inferred from the language of the court, that if the direct question presented by this case were before that tribunal it would be resolved in favor of the maker of the bond. Bigler, the maker, was in occupation of the estate purchased at the commencement of the war by his agent; and not only was he wholly excluded from occupancy and from possession during its continuance, but the improvements put on the property by him, at great cost, were destroyed and the estate otherwise greatly injured. Waller, the obligee, was in the Confederate army, and at the sale made under the trust executed by Bigler to secure the bond, became himself the purchaser; and he was doubtless, though since the war he has disclaimed title to the land as against Bigler, entitled as such purchaser to the possession.

We have already said that Waller is not to be held responsible for the injuries sustained by Bigler in consequence of the war; but, on the other hand, we cannot doubt that if interest on a debt should cease in any case, it should cease in this; and our duty is to determine this question as we believe it would be determined by the Supreme Court if submitted to its consideration.

It is more difficult to determine the period during which interest should cease. The actual beginning of the war against the United States doubtless, preceded the proclamation of the President of the 15th of April, 1861, calling out the militia to suppress insurrection; but the proclamation declaring the blockade of the ports of the insurgent States must be regarded as the first formal recognition of the existence of civil war by

the National Government. That proclamation was issued on the 12th of April, and that date, therefore, must be taken as the date of the commencement of the war. The period of its termination has not been so definitely ascertained. It was declared by the concurrent action of the President, and of Congress, to have ended on the 2d of August, 1866, and this date has been recognized by the Supreme Court as the end of the rebellion, intended by the abandoned and captured property act and some other legislative provisions. In another case depending on the effect of the statute of limitations, the court thought fit to decline fixing any precise date of termination applicable to all cases. This question being thus left open, we think it right in this case to take the establishment at Richmond of the adhering government of Virginia as the recognized government of the whole States, as the end of the war in this State. This event may be said to have taken place when the executive department of that government was removed from Alexandria to Richmond on the 26th of May, 1865. The period, then, to be excluded in the computation of interest, is the time from the 19th of April, 1861, to the 26th of May, 1865.

Second. What credit, if any, is to be given to Bigler for money received by Waller from the Confederate government?

The evidence shows that the sum of two thousand dollars was thus received in October, 1863, by way of compensation for use made of the property, and of indemnity for waste committed upon it. At that time it appears that the rate of Confederate notes for gold was thirteen for one. For this sum of two thousand dollars, reduced to the specie equivalent, with interest on the sum thus ascertained, credit is to be given on the bond.

Third. What credit, if any, should be given to Bigler for damage sustained by reason of non-fulfillment on the part of Waller of his contract to release the purchasers? It is clear enough, upon the evidence, that under the original contract of purchase, Bigler had a right to sell portions of the estate, and to have these portions released to the purchaser on payment to

Waller of so much of the purchase-money as would leave his security unimpaired. And it is sufficiently proved, that some time after the purchase, in 1853 or 1854, Bigler had some offers to buy small parcels of the tract, and applied orally to Waller for a release, and that Waller, for some reason, refused. But it does not appear that Bigler continued to make payments on account of the purchase until May, 1860. Under these circumstances, it would be difficult to sustain the claim for damages were the proof of the quantity of land sold, the price offered, and the demand for release under the contract much clearer and more specific than it is. But on all these points the evidence is too vague and indefinite to form the basis of a decree. We are obliged, therefore, to deny any credit on account of damages.

A decree may be entered in conformity with these principles.

UNITED STATES DISTRICT COURT—W. D. MICHIGAN.

Where there is no fraudulent intention, a dealer may, although insolvent, continue to sell his stock at retail, and endeavor to effect, if possible, a compromise with his creditors.

Where a trader makes a compromise with his creditors by making a sale of his stock, giving to the creditors part cash and part notes of the purchaser, the same being done in pursuance to an arrangement made with some of the creditors directly, and others through an agent, there is no fraud on the part of the debtor if an agent of one or more of the creditors exceeds his authority in accepting the compromise and the debtor is ignorant thereof.

When one debtor accepts a certain sum as a compromise, and he is not led to believe that he was getting as much as others, and he accepts the notes of his debtor's purchaser in part payment, he cannot be sustained in a petition against the debtor alleging a preference thereby under the Bankrupt Act.

In re Munger & Champlin

Withey, J.—Curren, Goodwin, Walker & Co., petition to have Munger & Champlin, copartners, declared bankrupts. There are five acts of bankruptcy charged, which I shall consider as involving but three questions. The first act charged is, that respondents, being insolvent, sold and transferred to divers persons, from time to time, portions of their stock in

trade with intent to defeat the operation of the Bankrupt Act, in this: they ascertained, January 3d, 1870, by taking account of stock, that their liabilities exceeded their assets by about sixteen thousand dollars, and thereafter, in January, February, March, and up to about the 18th day of April, they were endeavoring to effect a compromise of their debts, but were unsuccessful, and at the same time were selling goods from their store to customers in the ordinary way of trade. It is claimed that they thus conducted their business with intent to prevent proceedings against them in bankruptcy, and with intent to defeat the operation of the law. The proofs show that respondents were not only insolvent, but knew they were; that some time in February they endeavored to effect a compromise of their debts at fifty cents, and were not successful, and afterwards in March and April, they sought again to effect a compromise at thirty-five cents, during all which period they continued trading at their store in Kalamazoo as usual, selling to customers at retail from day to day.

But there is no proof of intent to defeat the operation of the Bankrupt Act, unless that kind of management of their business raises the presumption of such intent. In my opinion it does not; on the contrary, their efforts to settle with creditors without going through bankruptcy in court, was entirely legitimate, not prohibited by any provision of the Bankrupt Law; and continuing to sell goods in the usual way of trade, pending such negotiations, was entirely proper and justifiable, and what they ought to have done, so long as their intention was not fraudulent.

Undoubtedly if the proofs showed an intention by the debtors to so conduct their business as to avoid paying their debts, or to prevent their property being applied to the payment of their debts under the provisions of the Bankrupt Law; preventing proceedings in bankruptcy against them with a view to defeat the provisions of the act, then would be shown such an intent as to require that they be decreed bankrupts. But I find no such fraudulent purpose from the proofs in this case.

Then follows three distinct acts of bankruptcy, but as they raise but one question, I shall consider them together.

That question is whether a transfer made by respondents of all their assets not exempt, to George M. Colt, on or about April 18th, 1870, Colt being liable for them as indorser, was with intent either to prefer Colt, or to defeat the operation of the Bankrupt Act. It is shown that when respondents failed to effect a compromise at fifty cents, they made an effort to get a settlement at thirty-five cents. To this end one of the firm went to New York city, secured a meeting of a majority of their creditors there, stated to them their assets and debts, and asked a settlement at thirty-five cents. Nothing definite was then accomplished, but some of the creditors thought the debtors better keep their store open for the time being, and keep their stock replenished, and do the best they could until something definite could be done.

Not long subsequently to that visit to New York, Tefft, Griswold & Kellogg of that city, filed against them a petition to have them declared bankrupts, Mr. Hodges, of Chicago, being attorney for such petitioning creditors. After filing the petition and procuring an order against respondents to show cause, he went to Kalamazoo, saw respondents and Mr. Colt, as a merchant of that place, and then learned that Colt was willing to purchase their assets at a sum which should not exceed forty cents on a dollar of respondents' liabilities, by his notes at six and twelve months, provided respondents could be freed from all their liabilities.

Colt was the father-in-law of the respondent Champlin, was fully advised as to their assets and liabilities, was indorser on some of their paper; no question is made but that Colt is perfectly responsible. Hodges thought that the debts could be arranged on that basis, and was employed by respondents to secure the best terms he could from creditors. He accordingly visited New York, Chicago, and other places, and obtained such terms from a portion of the creditors, that although some of them demanded full pay, the aggregate did not exceed forty cents on a dollar of respondents' liabilities. Hodges now vis-

ited Kalamazoo again, and informed respondents and Colt of the result of his negotiations, exhibiting his authority from most of the creditors who accepted less than one hundred cents on a dollar of their claims.

The result was satisfactory to Colt, inasmuch as by paying a sum equal to forty cents of respondents' debts, they could be released from liability, and his title to the goods be thereby unquestioned. He accordingly took a transfer of their assets, gave his notes payable at six and twelve months to the respective compromising creditors, and agreed to settle with and pay all others of their creditors who had not made compromise terms. Munger & Champlin also signed the compromise notes. Hodges took the notes, transmitted them to creditors, and discontinued the proceedings in bankruptcy against respondents. Colt has settled, or arranged with all the other creditors satisfactorily, at least there is no proof of dissatisfaction on their part.

The only difficulty arising out of that sale, and the transactions connected with it, and affording the foundation for this case is, that Curren, Goodwin, Walker & Co., of New York, who bring forward this second petition against respondents, and on which this trial is had, authorized Hodges to take for their claim thirty-five cents *cash*, and Munger & Champlin's note for fifteen cents, making fifty cents; whereas, Hodges accepted thirty-five cents by Colt's and Munger & Champlin's *notes* at six and twelve months. Hodges informed Munger & Champlin and Colt of the terms named by these creditors on his second visit to Kalamazoo, but he was then and there shown a letter written by a Mr. Clark, from New York, to Mr. Colt, in which he states that Curren, Goodwin, Walker & Co. had informed him, after Hodges left New York, that they would take thirty-five cents. Clark was a partner of Colt's, and this letter induced Colt to believe that these creditors had authorized a settlement of their claims at thirty-five cents. It also seems to have induced Hodges to accept that sum. Hodges now said to Colt, and to Munger & Champlin, who also knew of Clark's letter, that he was the attorney of Curren, Goodwin,

Walker & Co., authorized to act for them, and he would accept for them thirty-five cents in Colt's, and Munger & Champlin's notes at six and twelve months. Hodges received all the notes, and transmitted them to the respective creditors. The petitioners returned to Hodges the notes sent them, saying that they did not sanction the settlement, and should now expect payment in full, and they soon after filed their petition in this case.

The question is whether Munger & Champlin, in view of these facts, are shown to have intended, by their sale to Colt, either to prefer Colt or to defeat the operation of the Bankrupt Act.

Hodges was agent for Munger & Champlin, for the sole purpose of receiving from creditors the best terms they would respectively make, and, if possible, such terms as would enable them to sell to Colt, and, with the proceeds of the sale, satisfy their entire debts. He was agent of Curren, Goodwin, Walker & Co., to accept for them thirty-five cents cash, and M. & C.'s paper for fifteen cents. When he accepted anything less or different, his action did not bind them, and therefore it is undoubtedly true that there was no authorized settlement of this particular claim. Nevertheless, Hodges informed both the respondents and Colt that he was authorized to act for Curren, Goodwin, Walker & Co. outside of the restricted terms he at first announced, and they believed him, and acted in pursuance of such representation in good faith.

Are respondents guilty of an act of bankruptcy in making that sale to Colt, when they acted in the belief that the terms made by a large majority of their creditors would enable them to satisfy all demands against them? If so, it must be because they can justly be said to have *intended thereby* either to prefer Colt or defeat the operation of the Bankrupt Act.

Mr. Justice Swayne, in *Langley* v. *Perry*, 2 N. B. R., 596, says: "The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the Bankrupt Law, unless it was meant to be so." Now the real question is, whether, *in fact*, Munger & Champlin *meant* to

accomplish either of the guilty acts charged, or whether, in *judgment of law*, they must be held to have so intended, because the transfer necessarily had the effect to prefer Colt, or to defeat the operation of the law.

My opinion, as already intimated, is that, *in fact*, they had no such intention; on the contrary, they acted upon the representation of Hodges in good faith, and in the full belief that he was authorized to settle for Curren, Goodwin, Walker & Co. at thirty-five cents, by Colt's notes at six and twelve months. And I am not able to say they must have known the effect of acting upon Hodges' representations that he was authorized to settle at thirty-five cents, would be to prefer Colt, or to defeat the operation of the law. If they had believed that Hodges was not authorized to take thirty-five cents for Curren, Goodwin, Walker & Co., then, in judgment of law, they should be held to have known that the effect of this sale would be a fraud on the law. In no other view should such rule be applied to them. They cannot, therefore, as it seems to me, be held to have intended a fraud. How can they be said to have known that Curren, Goodwin, Walker & Co. would not accept thirty-five cents, unless they first knew that Hodges was not authorized to settle for thirty-five cents? If they believed what Hodges represented as to his authority, how can they be said to have intended a fraud on the act in any particular? It might be claimed, as Hodges was acting as their agent in procuring terms of settlement from creditors, any fraud or misrepresentation on his part, by which one or more creditors were not settled with, would be the act or fraud of his principals, and the effect of the agent's fraud being to give a preference and to defeat the operation of the law, respondents should be held to have intended the act charged against them.

But, if such be the rule, there are two objections in my mind to its application here. One I have already stated, that Hodges was not the agent of respondents in anything wherein he assumed to act for creditors. Curren, Goodwin, Walker & Co. saw fit to authorize Hodges to accept a certain sum, viz., thirty-five cents cash and fifteen cents in notes, making fifty cents, by

verbal authority. He was their agent to do this, and, when he exceeded his authority, he did not thereby become the agent of the debtors. He was the agent of both parties: for one to obtain the best terms he could; for the other to accept a stipulated amount; so that, if Hodges acted with a fraudulent intent in accepting thirty-five cents, he cannot be said to have been the agent of the debtors in so doing. When it came to the transaction of transferring the goods and taking Colt's paper in payment, Munger & Champlin acted for themselves. In accepting that paper for creditors, Hodges acted for those creditors whose agent he was, and not for the debtors.

The other objection is, that the proofs do not show that *Hodges intended* any fraud; on the contrary, although he exceeded his authority, I incline to the opinion that he regarded Clark's letter as justifying his acceptance of thirty-five cents for Curren, Goodwin, Walker & Co.

The remaining act of bankruptcy charged is that the transfer of Colt's notes to the compromise creditors, was with intent to prefer one or more of them. I have already stated that the notes given by Colt for the stock of goods were made payable to the respective creditors who had agreed to terms of compromise, and were passed over to Hodges by Munger & Champlin fer those creditors, and that he did transmit to such creditors the notes.

In turning such notes over to creditors, respondents were carrying out their proposed plan of settling their debts, and in the belief that thereby, and by Colt's assumption of the uncompromising debts, *all their* liabilities would be settled. If Curren, Goodwin, Walker & Co.'s debt had in fact been settled as respondents supposed it was, there could be no claim that a fraud on the provisions of the law had been intended, by preference or otherwise, for all debts would then have been satisfied or arranged for, on just the terms creditors had respectively seen fit to make. Now, clearly to my mind, respondents believed they had accomplished just that result. True they have not, as it turns out, settled their indebtedness to petitioning creditors, because the agent exceeded his authority in making

terms, but there was good ground for them to believe that Hodges was authorized, and that this debt, like their other debts, was arranged. So that when they turned Colt's notes over to creditors, there was evidently no intent other than to consummate the arrangement of all their liabilities, on what they regarded as an agreed and accepted basis.

It should be remarked that there is no testimony tending to show that terms were obtained from creditors upon any misrepresentation or concealment; each creditor seems to have made terms without reference to the amount any other creditor was to receive.

There is no evidence to show that any creditor was led to believe he was getting as much as others. There is no pretence that there was any such representation by Hodges or the debtors. A creditor may make as favorable terms with his debtor as he pleases, and if less is accepted, in view of the debtor's circumstances than others receive, the creditor is nevertheless bound by his settlement. This feature of the proof is not unimportant with reference to the questions in controversy, and has led me to regard the compromise and arrangements of the debtors with their creditors precisely as though each creditor had compromised at the same rate per cent.

The charges are not, in my opinion, sustained. The petition is dismissed.

Dickinson & Dickinson and *George Gray*, for petitioners.

L. S. Hodges, for respondents.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Where a stock of goods, which had been mortgaged, were taken possession of by the assignee, and were sold by order of court, and the money held subject to its order, the mortgagee claiming it by petition, and the assignee opposing on the ground that the mortgage was voidable under 2d clause of 33d Section of the Bankrupt Act, the mortgagor being a trader, and the loan being made out of the ordinary course of business within four months of the mortgagee's bankruptcy; *Held*, that the mortgagee's petition must be dismissed, for the reason that it was out of the ordinary course of business, the mortgagor being a retail dealer,

a mortgage of the whole of his stock was a confession of insolvency. If made directly to the creditor, it would have been an act of bankruptcy, and here both parties seem to have considered it injurious to the mortgagor's credit, and agreed that it should not be recorded until some necessity should arise therefor.

If the mortgagee should have applied to court to direct assignee to bring an action against the creditor who received the proceeds of the mortgage, an order would probably have been made to that effect.

In re BUTLER.

LOWELL, J.—The stock of goods which came to the possession of the assignee was mortgaged to the petitioner, and by order of court the stock was sold by auction and the money now awaits the order of the court. The mortgagee petitions to have it paid out to him, and the assignee opposes the petition, on the ground that the mortgage is voidable by him under the second clause of the 35th Section of the Bankrupt Act.

The evidence tends to show that Butler was a retail trader, having a shop on Tremont street, Boston, and one at North Cambridge; that his stock in the latter place was mortgaged in May, 1870, but under what circumstances is not shown; that towards the end of June, if not earlier, he found difficulty in meeting his engagements, and some creditors did not obtain prompt payment of their accounts. He was owing Mr. Cushman a balance of about fifteen hundred and eighty-six dollars on a note which had been given for a stock of goods in April, 1868, and on which he had made many small payments from time to time. Mr. Cushman asked him for another payment, and he said that he could not make it unless he borrowed the money. Kimball, a clerk or partner of Mr. Cushman, the witness was ignorant which, then suggested to Mendell, the now petitioner, that he might invest his money to advantage in a mortgage of Butler's stock, and to Butler that the petitioner would probably lend him the money. He brought the parties together, and the petitioner agreed to lend him sixteen hundred dollars. The transaction was concluded July 1st, 1870, and the money lent and mortgage delivered in Cushman's place of business, and Kimball, the clerk or partner, lent the petitioner six hundred dollars to make up the sum. The money was paid over by the bankrupt to Cushman in settlement of the old note, but

it is not shown that this was done in presence of the mortgagee, or that he was, in fact, fully informed of the nature of the transaction as it now appears. He made no inquiry into the standing or condition of the mortgagor's affairs, but relied mainly as to security on the advice of Mr. Cushman and Mr. Kimball. Butler asked him to keep the mortgage off the record because it would injure his credit, and he agreed that he would not record it at once, and so instructed Mr. Kimball, with whom he left the note and mortgage. The stock in trade of Butler was attached about two weeks after, and so remained until he went into bankruptcy, on the 26th of August, 1870.

The bankrupt and the mortgagee were examined orally before me, but neither Mr. Cushman nor Mr. Kimball were witnesses in the case.

Upon this evidence it is plain that the money was raised for the express purpose of paying a pre-existing debt, and the intent to prefer the creditor may be fairly inferred. The only doubt is, whether the mortgagee was a party to the fraud upon the statute, or was kept in the dark by his friends. There is evidence from which it may be argued that he must have understood the scheme, unless he were willfully blind; but the assignee relies more particularly upon the second clause of the 35th Section of the statute, as imposing such knowledge upon him by operation of law, unless he made diligent inquiry.

It is strenuously urged in opposition to this view, that the clause in question does not refer to mortgages at all, nor to preferences, whether direct or indirect, but only to sales out of the ordinary course of business of a trader.

Clauses one and two of Section 35, are copied from the General Statutes of Massachusetts, C. 118, Sections 89 and 91, with this important difference, that in both those sections the limitation was six months, whereas, in clause one, relating more particularly to preferences, it is four months. Under the State statute, the second clause was held to apply to preferences equally with the first. *Metcalf* v. *Munson*, 10 Allen, 491; *Nary* v. *Merrill*, 8 Allen, 451; and it is plain that the language of the second clause, taken by itself, does fairly include prefer-

ences excepting such as are made by payments of money. But under the Bankrupt Act, the tendency of opinion has been, that the difference in limitation shows an intention to put preferences on a different ground from other technical frauds. For instance, in a late important and well-reasoned case it was held in an action by an assignee to recover back money paid by the bankrupt to a pre-existing creditor, that the declaration was bad for alleging the payment to have been made within six months, instead of four months, before the bankruptcy. *Bean, Assignee*, v. *Brookmire et al.*, 4 N. B. R., 196.

But I hold it still open to argument whether the 39th Section does not substitute six months as the limitation in all cases, repealing to that extent the 35th Section.

In the case just cited it appears to have been argued that the 39th Section abolished all limitation. This argument was very properly overruled; but it may be said with a good deal of plausibility, that when Congress in the 39th Section made a preference an act of bankruptcy, and proceeded to say that if it was made the foundation of a petition within six months the debtor might be adjudged a bankrupt, and if he were, the assignee might recover the money or other property, they were establishing a general rule, by means of a special example, and that that rule is, that preferences within six months may be avoided by the assignee. If so, this section, to that extent, repeals the earlier section. This is a view that has lately occurred to me, and on which I reserve my final opinion. If this construction should be ultimately adopted, it will certainly reconcile some apparent discrepancies, and remove some apparent difficulties.

The precise point of law in this case is, whether a person advancing his own money to a trader or other person in business, and taking security from him, out of the ordinary course of his business, is to be held liable to reconvey the security if the only fraud intended by the debtor is the payment of a creditor by way of preference.

In Massachusetts, it was held in the affirmative; *Crafts* v. *Belden*, 99 Mass., 535; but as we have already seen, the statute

of that State made no distinction between preferences and other technical frauds. Here the argument is, that if the creditor himself, who has received the preference, cannot be pursued after four months, it is very hard that one who is merely aiding him to obtain his money should be liable for two months longer. I feel the force of this objection; but the language of the act plainly includes this case, and it does not seem to come within the first clause, which contemplates that the money or property coming from the debtor should be applied by the person receiving it, to the payment or security of the creditor. A transaction of the kind now in question, is one step farther from the preference, and fully within the second clause. In fact, this mortgage was given within the four months, so that if it came within the first clause, the assignee would be entitled to recover; but it seems to me that it does not, and the assignee would be without remedy if it were not for the second clause, and I cannot believe the statute is so defective.

Taking this to be so, it is clear that the mortgage was out of the ordinary course of business of Mr. Butler, because he was a retail trader, doing a business of about one hundred dollars a day, and a mortgage of such a trader's whole stock is a confession of insolvency. *Nary* v. *Merrill*, 8 Allen, 451. If made directly to the creditor it would have been an act of bankruptcy, as I have often decided. And the evidence shows that both parties considered it injurious to his credit, and for that reason agreed that it should not be recorded until some necessity should arise therefor.

The petition of the mortgagee must for these reasons be dismissed.

I here desire to express my preference that such cases should be brought in the form of actions at law, that a jury may decide the facts.

Here the evidence tends very strongly to show that a creditor was preferred. If the creditor himself were innocent, but the debtor and mortgagee contrived the preference, the latter would be liable, though the creditor would not. *Crafts* v. *Belden*, 99 Mass., 535. But in this case it is possible that the

mortgagee was hoodwinked by the others, though the *prima facie* evidence is against him and is not met, and I do not believe the truth to be so.

Supposing, however, that all parties were cognizant of the exact nature of the transaction, the assignee could certainly recover of the creditor who is the party benefited, and justice would seem to require that he should be the person to repay the money. If, then, the mortgagee should apply to me to direct the assignee to bring an action against the creditor, on some proper terms, I should probably make such an order.

Petition dismissed.

L. W. Howes, for mortgagee and petitioner.

T. F. Nutter, for assignee.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Where a stock of goods was sold to a *bona fide* purchaser, and where there is no evidence that the vendor was insolvent at the time of the sale; but it appearing on the trial that the purchaser had previously tried to buy the stock, and that the vendor had refused, but finally sold out because he wished to change his business,

Held, that an adjudication would not be made on an involuntary petition, setting up the sale of the stock as the only act of bankruptcy.

In re VALLIQUETTE.

THE petition contained three allegations of acts of bankruptcy: the first being that Valliquette, being a merchant, had "*fraudulently stopped payment of his debts*" within six months. The second, that being insolvent, he had made a sale of his stock of goods to a creditor with intent to give him a preference. And third, that he had made a sale of his stock of goods with intent to defraud his creditors.

Valliquette filed an answer to the petition, denying the commission of any of the acts of bankruptcy alleged in the petition, and demanded a jury trial.

The trial came on to be heard before Judge Hall and a jury at the November Term of the District Court, and the petition-

ers, to sustain this case, called Reynolds, the person who bought Valliquette out, and he testified that some two weeks before the sale he had applied to Valliquette to buy him out, and Valliquette refused to sell; that two weeks later Valliquette sent him word that he had concluded to go into some other business and would sell out. Reynolds was not then a creditor, but finding that Valliquette was owing several parties debts not due, he applied to these creditors, with Valliquette's consent, and arranged that such creditors should take his notes instead of Valliquette's, and give him time.

An inventory was then taken by a disinterested party, and a bill of sale given Reynolds by Valliquette, and Reynolds then took up one thousand two hundred and seventy dollars of Valliquette's outstanding indebtedness, and paid him one hundred dollars in cash for the stock, which was its full value.

There was no evidence offered that Valliquette was insolvent at the time of this transaction, and no evidence of intent to defraud or to give Reynolds a preference other than the inference, if any, which could be drawn from the transaction.

Counsel for Valliquette asked the court to render a verdict for the respondent.

Counsel for the petitioners claimed that inasmuch as it was admitted that Valliquette had not paid the debt due the petitioners (which was an account), he had fraudulently stopped payment within the meaning of the amendment of 1870; and that the fraudulent stoppage mentioned in the amendment was not confined to commercial paper, but applied to the non-payment of any debt.

The court adjourned over night and examined the question, and in the morning charged the jury that the position assumed by the petitioners' counsel was untenable, and directed a verdict in favor of the respondent.

William Russell, of New York, for petitioners.

George Gorham, of Buffalo, for respondent.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Although the winding up and settlement of the estate are to be deemed proceedings in bankruptcy under the 43d Section of the Bankrupt Act, which contemplates the superseding of proceedings under the Act, and, in given contingencies, the "resumption" of such proceedings, yet it is evident that the true meaning is the substitution of the modes prescribed in this section for the ordinary modes. Such proceedings are none the less "proceedings in bankruptcy" under the act because they are special in their nature. Either *mode* can be adopted, the ordinary one or this special one. The trustees, under direction of the committee, can wind up the estate just as the bankrupt could have done, *or* they may be restricted to the more limited powers and duties of ordinary assignees.

In re DARBY.

THE questions submitted to the court involve the course of proceedings under Section 43 of the Bankrupt Act, the terms of which are very obscure.

The general purport of said section seems to be, to substitute trustees "under the inspection and direction of a committee of the creditors" for the ordinary machinery provided by the act, and on their appointment, confirmation, etc., to cause said ordinary proceedings to be "superseded." Provision is made for "resuming the proceedings" in certain contingencies, and for the discharge of the bankrupt as if the ordinary course has been pursued.

The trustees "have and hold" all the bankrupt's property and estate "in the same manner and with same power and rights in all respects as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee would have done had such resolution (of the creditors) not been passed. * * And the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors," which resolution is "that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors." The act then provides that "said trustees shall proceed to wind up and settle the estate under the direction and inspection of such

committee of the creditors for the equal benefit of all such creditors."

Resting on those provisions alone, it would seem to be the duty of the trustees, under said inspection and direction, subject to the orders of the court, to proceed to wind up the estate just as the bankrupt himself could have done if no proceedings in bankruptcy had been had; distributing the proceeds, however, *equally* among the creditors, *or* as the assignee would have done if such resolution had not been passed.

These are alternative modes; yet the section proceeds:

"And the winding up or settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this act; and the said trustees shall have all the rights and powers of assignees in bankruptcy."

Is the last clause cited a limitation on the powers of the trustees? Are they clothed merely with the powers of the assignees? If so, wherein has the section any substantive force? If the substitution of trustees to act under the direction of a committee works only a change of *name*, what necessity for a committee, and what its legal functions? An assignee acting under the direction of the court has prescribed duties to perform without the intervention of a committee, and cannot adjudicate upon claims against an estate. The trustees are to act under the direction of a committee, and, although they are subject to the orders of the court, must *all* claims be first heard and allowed by a Register? Are their functions confined merely to the management, sale, or disposal of the estate, without reference to what claims there may be against it, further than those claims are established in the ordinary mode before the Register?

Although "the winding up and settlement of estates" are to "be deemed proceedings in bankruptcy," and the section contemplates the "superseding" of proceedings under the act, and, in given contingencies, the "resumption" of such proceedings; yet it is evident that the true meaning is the substitution of the modes prescribed in this section for the ordinary modes. Such proceedings are none the less "proceedings in bankruptcy under the act" because they are *special* in their nature. Either

mode can be adopted, the ordinary one or this special one. If the special mode be chosen, either of the alternative courses named can be pursued, as the court may order; viz., the trustees, under the direction of the committee, can wind up the estate just as the bankrupt could have done if he had not gone into bankruptcy, exercising all his rights, powers, and duties over the whole estate, for the purpose of collecting dues, disposing of property, compromising, allowing demands, etc., subject only to the necessity of an equal distribution of assets among creditors; *or*, they may be restricted to the more limited powers and duties of ordinary assignees. If they act under the broader or more general powers, it is obvious that they will often need the interposition of the court in various ways, such as compelling the attendance of witnesses, causing examinations to be had under oath, etc., for they are not clothed with "judicial" authority. "The *court* * * shall have power to summon and examine on oath or otherwise, etc., in the same manner as in other proceedings in bankruptcy under this act;" that power is vested solely in the *court*, not in the trustees. Hence, when such interposition is needed, the trustees must apply to the court therefor. The powers of the "court" in such cases, are exercised, not necessarily in *all* instances, by the judge of the court *personally*, but often by the Register, under his direction, on special or general reference to him. It is not necessary to attempt here an accurate statement of all questions cognizable before the Register without a special order of the judge in the first instance, because the points submitted require no such statement. Applications can be made to the judge in all doubtful matters, and he can make such orders as such application may demand. In the case under consideration, the original order of this court was not so full and explicit as is desirable. The ordinary course was originally taken in this case, but subsequently, under an order of the court, a special meeting was called to determine whether the creditors would elect to have the estate "wound up" under Section 43. At that special meeting, the desired action having been had, and the necessary course thereunder having been pursued and the proper transfer made by

the assignee to the trustees, the order of the court should have determined in what manner the trustees were to act, whether with the limited powers of assignees, or the broader powers stated. This was more important, inasmuch as many demands had previously been proved before the Register, and most of the creditors had voted at the election of the assignee.

TREAT, J.—Under Section 43 the trustees, under direction of the committee, may, if so ordered by the court, proceed to settle the estate just at if there had been no adjudication of bankruptcy and the bankrupt was managing his own affairs, taking care always to secure legal protection to each of the creditors. If, under such a general order, the interposition of the court is needed for the examination of witnesses under oath, etc., application therefor may be made to the judge or Register, and, if made to the judge, he, on granting the same, will order the examination to be had before the Register or otherwise. In other words, whenever the trustees and committee are satisfied that demands are correct, and need no testimony to be taken, they can allow the same. When they are not satisfied, the demand should be proved before the Register on notice to the trustees. All demands not allowed already should be presented to the trustees for allowance in the first instance, and, if allowed by them, no further action need be had; but, if the trustees demand proof, they can apply to the Register or judge for an order to have testimony taken with respect thereto before the Register or otherwise, and for the claims to be passed upon by the Register. The trustees can proceed in all cases and in all matters, if the court so orders, just as the bankrupt could have done if he had not gone into bankruptcy, and, consequently, if they cannot dispose of a matter before them without "judicial" investigation, they must have the action of the Register or judge. This follows from the fact that the trustees have no judicial authority, and that, when such authority is needed, they must resort to it just as the bankrupt would have been compelled to do if no proceedings in bankruptcy had been instituted.

The court has heretofore granted orders for examination of witnesses, stating that the testimony must be taken before some one competent to swear the witnesses; said testimony having the force of ordinary depositions when properly reduced to writing. The trustees have no power to administer oaths.

All *disputed* demands will hereafter be referred to the Register, and when the trustees need ordinary orders concerning the taking of testimony, etc., they can apply to him therefor. Where no action strictly judicial is needed, they will, under a General Order to be now entered, proceed with all the matters committed to them as fully as the bankrupt could have done, if he had made no application in bankruptcy. Thus, under Section 43, the estate can be "wound up" by said trustees under the direction of the committee, without any interposition of the Register or judge, further than resort to judicial action may from time to time require.

The claim against the estate allowed by the Register before the appointment of an assignee or of the trustees, if the trustees so elect, can, on notice to the respective claimants, be opened and passed upon anew by the Register. It will not be necessary, except where the Register has no power to act in the first instance, for the trustees to apply to the judge. When they are satisfied a demand is correct they can allow it. They can dispose of assets and settle the estate without special orders in each matter before them; keep their own accounts and records of their proceedings; have the aid of the Register or judge when needed, and finally have their actions ultimately closed by the formal decree of the court.

The Register will hereafter allow no claims except such as are disputed, or are submitted to him for decision by the trustees. As the original notice to the creditors required them to prove their demands before the Register, and formal proofs thereof may, in many instances, still be sent to him, he should not pass on them without notice to the trustees. The latter should give such notice to the creditors as will cause further demands to be presented to them, in the first instance, and thus avoid unnecessary delay and costs.

In accordance with the views above stated the court now makes the following order:—

Whereas, Andrew Park and John K. Tiffany have been duly elected trustees of the estate of John F. Darby, bankrupt, under Section 43 of the Bankrupt Act, and this court has heretofore confirmed the resolution of the creditors and their selection of trustees,

It is ordered that said trustees have and hold the estate of said bankrupt in the same manner and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken; and that said trustees proceed to wind up and settle said estate under the direction and inspection of the committee of creditors appointed therefor, for the equal benefit of all the creditors of said estate; and also do all and singular which by law and this order they may lawfully do to carry into effect the resolution of said creditors.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The grantee of the franchises of a corporation to operate a railroad can acquire no greater rights than the corporation itself has by the terms of its charter. The purchaser must take his title subject to all the conditions of the original grant, and subject to all duties and liabilities to the State, the public, and individuals, none of whose rights can be impaired by the transfer. Hence, there are no such inherent difficulties in the way of the sale and transfer of the property and franchises of a railroad as would require such a construction to the United States Bankrupt Act of 1867, excluding railroad corporations from the operation of that clause of the act, a literal construction of which clearly rendered them liable to be dealt with under its provisions.

ADAMS *v.* BOSTON, HARTFORD & ERIE RAILROAD COMPANY.

SHEPLEY, J.—This is a motion to dismiss the petition in this case upon the ground that railroad corporations are not included within the provisions of the 37th Section of the Bankrupt Act, and not subject to the process provided by the act, and that therefore this court has no jurisdiction in bankruptcy to entertain this petition.

The first ground of objection to the jurisdiction of the court is, that a railroad corporation is a public corporation, created for a public purpose, and bound to the State for the performance of a public duty.

The 37th Section of the Bankrupt Act provides as follows: "The provisions of this act shall apply to all moneyed, business, or commercial corporations, and joint-stock companies."

Section 48 enacts: "The word 'person,' shall also include corporations."

Section 48 is not, however, to be construed as applying the word "person" to include any other corporation, as subject to the provisions of the act, than those described in the 37th Section.

Public corporations, created for municipal or political purposes, and such private corporations, as are ecclesiastical, or eleemosynary, or established for the advancement of learning, are clearly not made subject to the provisions of the act.

Private corporations are divided into ecclesiastical, and lay. Lay corporations are divided into civil, and eleemosynary. Civil corporations are created for an infinite variety of purposes, such as affording facilities for obtaining loans of money, the making of canals, turnpike roads, and the like.

The words of the 37th Section, "moneyed, business, or commercial corporations," would seem to have been intended to embrace all those classes of corporations that deal in, or with, money or property, in the transactions of money, business, or commerce, for pecuniary gain, and not for religious, charitable, or educational purposes.

Accordingly, District Courts of the United States in various districts, have treated manufacturing, mining, and similar corporations, and in one circuit at least, railway corporations, as subject to be dealt with, under the provisions of the Bankrupt Act.

But it is contended, that the public purposes for which railways are created, and the public duties they are bound to perform, make them public corporations, and therefore, such a construction should be given to the words of the statute, as would exclude them from its operation

In the popular meaning of the term nearly every corporation is public, inasmuch as they are created for the public benefit. But if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, the corporation is private.

"Strictly speaking," says Mr. Justice Story, in *Dartmouth College* v. *Woodward*, 4 Wheaton, 701, "public corporations are such only, as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature, or objects of the institution. A bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases the uses may, in a certain sense, be called public; but the corporations are private, as much so, indeed, as if the franchises were vested in a single person."

The case of *Treadwell* v. *Salisbury Manufacturing Co.*, 7 Gray, 404, cited as an authority in support of the position that this is a public corporation, is not, in fact, in conflict with the opinion of Mr. Justice Story, just quoted. In the learned opinion of Judge Bigelow in that case, he does refer to "corporations established for objects *quasi* public, such as railway, canal, and turnpike corporations;" but he does not describe them as public corporations, but only as corporations established for objects *quasi* public. Neither upon principle or authority can this corporation be properly classed among public corporations, or on that ground exempted from the operation of the Bankrupt Act.

It is further contended, however, that the Legislature of Massachusetts, in creating this corporation, has subjected it to certain duties and liabilities; that these liabilities are not transmissible, that these duties cannot be delegated, that the corporation

cannot divest itself of the power it has of performing these duties: "that it is a Massachusetts corporation, a creature of the laws of Massachusetts, placed under the supervision of the authorities and the courts of Massachusetts, and liable to perform certain duties, which, by the laws of Massachusetts, cannot be performed by any person to whom its property may be transferred or its franchises delegated."

The force of this argument, which seems to apply solely to Massachusetts corporations, and to claim the application to Massachusetts railroad corporations of a special exception from the operation of the Bankrupt Act, independent of and distinct from any rule which may apply to railway corporations existing under the laws of other States, is somewhat impaired, by the fact that the duties of this corporation have been delegated, and are now delegated, by the action of the Supreme Court of Massachusetts, to a board of receivers; that by the action of the same distinguished tribunal this corporation has been and now is, in fact, divested of the power of performing its public duties, and that it is not now, by reason of the action in the premises of the highest judicial tribunal in the Commonwealth, in the possession or exercise of its franchises so far as those franchises confer upon it the power to build, operate, and control the railroad.

And we look in vain into the legislation of Massachusetts for any indications of a public policy, to exclude the property of railroad corporations, or such of their franchises as are in their nature assignable and transmissible, from the liability to be taken by due process of law and applied to the payment of corporate debts.

East Boston Freight Railroad Co. v. *Hubberd et al.*, 10 Allen, 459, note, is a case where the Grand Junction Railroad and Depot Co., became insolvent, and George W. Gordon, a creditor, recovered judgment, and the sheriff levied his execution upon their franchise and sold the same with all the rights and privileges, so far as related to the receiving of tolls, for the term of ninety-nine years. The title of the purchaser at the sheriff's sale was upheld by the court.

A corporation created for the purpose of constructing, owning, and managing a railroad, cannot, it is true, make any alienation of its general franchise to be a corporation, or its subordinate franchises to manage and carry on its corporate business without distinct legislative authority. Such is the law in England. *Winch* v. *The Birkenhead R. Co.*, 13 Eng. L. and E., 506; *South Yorkshire R. Co.* v. *Great Northern R Co.*, 19 L. and E., 513; *Shrewsbury & Birmingham R. Co.* v. *The London & Northwestern R. Co.*, 21 Eng. L. and E., 319; and in Massachusetts, *Heuwe* v. *Pinkerton*, 14 Allen, 385; *Richardson* v. *Sibley*, 11 Allen, 65; *Commonwealth* v. *Smith*, 10 Allen, 455.

This distinct legislative authority for the alienation of the assignable and transmissible franchises of railroads to carry on their business of managing a railroad and taking tolls, has been freely accorded in Massachusetts, and the public policy of the Commonwealth embodied in its legislation allows a creditor to sell these franchises on execution, and permits the corporations within prescribed limits to alienate them for the payment of debts or the security of creditors. General Statutes of Massachusetts, C. 88, Section 120 *et seq.*; C. 68, Sections 25, 26.

It is contended that the authority given in the Massachusetts statute to attach and levy on "the franchise of a turnpike or other corporation authorized to take tolls," does not include railroad corporations; that the words "authorized to take tolls" are only applicable to turnpike, canal, lock, and bridge corporations, and not to railroads.

An examination, however, of the legislation of Massachusetts will show that "an authority to take tolls" is given as one of the franchises of railroad corporations, and that similar words of description of such a franchise are found in all the general and special laws relating to such corporations. Similar words are also used as apt words of description in the judicial decisions of Massachusetts and other States, and in the decisions of the courts of the United States. Chapter 63, Section 112, General Laws of Massachusetts, relating to railroad corpo-

rations, provides, "Each corporation may establish for its sole benefit *a toll* upon all passengers and property conveyed or transported on its road."

This form of expression is found in all the early railroad charters in this country, and has been continued in use, so far as we are able to discover, to the present time. Section 5th of the act to establish the Boston and Lowell Railroad corporation, enacts, "That a toll be and hereby is granted and established for the sole benefit of said corporation, upon all passengers and property of all descriptions, which may be conveyed or transported upon said road." The same right to take toll is conferred in the charter of the Boston and Providence Railroad, and continued in use in the charters granted to other railroads, until embodied in the general legislation respecting railroad corporations; after which the charters of many railroad corporations, and among others of those whose franchises have been since transferred to the Boston, Hartford, and Erie Company, contained provisions conferring upon them the rights and subjecting them to the liabilities provided in the 39th and 44th chapters of the Revised Statutes. Chapter 39, Section 83, Revised Statutes of 1836, provides, "Every such corporation may establish for their sole benefit a toll upon all passengers and property," etc., etc.

If, therefore, the questions had not been previously decided by the Supreme Court of Massachusetts, whose decision this court would adopt on a question of the construction of a statute of that State, we should have no hesitation in deciding that railroad corporations were subject, to the provisions of the 25th and 26th Sections of the 68th chapter of the General Statutes of Massachusetts, as "corporations authorized to take tolls." The Supreme Court of the State has so considered the law in the cases before cited.

But it is not believed that the question, whether railroad corporations are subject to be dealt with under the provisions of the Bankrupt Act, is one, the solution of which is dependent upon the special provisions of the statutes of the several States regulating the transfer of the corporate property, or

franchises, or the mode of applying them to the payment of the corporate debt.

The grant of the constitutional power to Congress, to establish uniform laws on the subject of bankruptcies throughout the United States, is general in its terms and unlimited. It was not doubted at the argument on this motion that it applied as well to corporations as to natural persons. The only question which can arise is, whether Congress has, by appropriate legislation, in the exercise of its powers conferred by the Constitution, rendered *railroad* corporations subject to the provisions of the act.

As the system of bankruptcy is to be uniform throughout the United States, the solution of this question must depend upon the construction of the terms of the act itself, and not upon the particular legislation of the several States.

"The provisions of this act shall apply to all moneyed, business, or commercial corporations."

To attempt to limit the word "business" in this clause of the statute, so as to be be merely synonymous with trading, would deprive it of its meaning, beyond that included in the other words "moneyed" and "commercial." A trading corporation is a commercial corporation. The word "business" has a broader meaning as applied to corporations. *Harris* v. *Amery*, 1 L. R., 1 C. P., 154.

A railroad corporation is chartered to conduct the business of a common carrier of passengers and merchandise. Is there any principle of public policy, which would require that the plain provisions of the statute should receive such a judicial construction, as would exclude this class of corporations?

We have already seen that the public policy of the State in which this corporation exists allows the alienation of the franchises and property of railroad corporations for the payment of their debts. The inconvenience attending such alienations is obvious. But as the argument, *ab inconvenienti*, has not been sufficiently strong, to prevent the State from allowing these franchises to be sold, and the proceeds of the sale applied in payment of the debts of the first attaching creditors, it certainly does not apply with greater force to a statute providing

for the more equitable division of the proceeds among all the creditors.

The franchise which authorizes a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, is not alienable or transferable without direct and positive legislative authority. This is the franchise to be a corporation. It is the life of the corporation. Coupled with the grant of this franchise of corporate existence, are the grants to the corporation of those franchises to carry on the corporate business, which are grants of valuable privileges, and which in the case of most private corporations may be transmitted (as the history of this corporation shows they have been transmitted repeatedly) from one corporation to another, or to individuals, without great detriment to any public objects for which they were created.

This distinction between those franchises of corporations, which are inalienable without a positive provision of law, and those possessing nothing in their nature inconsistent with their being transferred or assigned, has never been more clearly defined than in the learned opinion of Mr. Justice Curtis in the case of *Hall* v. *Sullivan Railroad Co.*, 21 Law Reporter, 138. "The franchise to be a corporation is therefore not a subject of sale and transfer, unless the law by some positive provision has made it so, and pointed out the modes by which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessary corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable."

The grantee of the franchises of a corporation to operate a railroad can acquire no greater rights than the corporation itself has by the terms of the charter. The purchaser must take his title subject to all the conditions of the original grant, and subject to all duties and liabilities to the State, the public, and individuals, none of whose rights can be impaired by the transfer.

It does not appear to us that there are any such inherent difficulties in the way of the sale and transfer of the property

and franchises of a railroad, subject to these conditions and limitations, as would require us to give such a construction to the statute, as would exclude the corporations from the operation of that clause of the Bankrupt Act, a literal construction of which clearly renders them liable to be dealt with under its provisions.

The motion to dismiss the petition is overruled.

The opinion of the court having been read, Judge Curtis, as counsel for the defendant road, said "that it had been intimated to him that a petition for a review of this decision would be filed in the Circuit Court under the provisions of the Bankrupt Act. He did not know whether the filing of such a motion would operate as a stay of proceedings. Ordinarily, very likely it would not, but this was a peculiar case. The question was a grave one, involving, as it did, the jurisdiction of the court. He was not, however, now prepared to make any motion upon the subject."

Judge Shepley said "that ordinarily the filing of a petition for the exercise of the revisory power of the Circuit Court does not operate as a delay. This, however, was a grave question. Being entirely ignorant what might be the view of Judge Clifford, he should consider, if a petition for review were presented, that it would be proper to extend the time and grant delay until it should be determined what action should be taken."

Judge Hoar, appearing in behalf of Mr. Munson, said "that a part of the road was now in an unfinished state. Every one believed that it was for the interest of the road that this part should be finished as speedily as possible. A preliminary agreement had already been made, and a petition had been presented to the Supreme Court of this State, as well as to courts in Rhode Island and Connecticut, for authority to make the agreement. He was not now prepared to make any motion, but since the jurisdiction of the court had been sustained, it being a question how far the State Court had jurisdiction, the parties would desire to have the sanction of the Court of Bankruptcy, to the measures which were proposed, so as to continue the work till the road is completed."

Judge Shepley said "that he had not considered the question in relation to the power of the receivers appointed by the State court, and that he had not intended to enjoin the making of any contract with the receivers. The putting of the road into bankruptcy would not affect the validity of the mortgage. And it was his first impression that until an assignee was appointed, the action of the receivers, who are officers of the State court, and the validity of the arrangements made with them, would not be affected by the action taken by this court."

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Where a judgment is regularly recovered under the laws of a State, and execution and levy has duly followed the entering of a judgment, *even though* prior to the commencement of bankruptcy proceedings, the same are void if the debtor suffered (not procured) the recovery of the judgment, and the subsequent execution and levy, and the creditor had reasonable cause to believe the debtor insolvent.

BEATTIE, *Assignee of* MORSE, *v.* GARDNER *et al.*

THIS is a bill in equity, filed by the plaintiff as assignee in bankruptcy of Daniel Morse, an involuntary bankrupt, to set aside four judgments recovered and docketed against the bankrupt on the 21st day of May, 1868, one of such judgments being in favor of the defendant, Hiram Gardner, and the other three being severally in favor of said Scoville, Harwood, and Stone, respectively. The defendent Ransom was the sheriff of Niagara county, who had levied upon the real and personal property of the bankrupt, by virtue of executions issued on such judgments, on the said 21st day of May, 1868, and who had advertised such personal property for sale on the 27th day of the same month.

On the 26th day of the same month, a petition in bankruptcy was filed against Daniel Morse, the defendant in such judgments, and an injunction staying the sale so advertised was granted by the Bankruptcy Court. The plaintiff was subse-

quently duly appointed, and qualified as the assignee of said Morse, and then, after demanding possession of the property levied on, filed his bill in this suit. The defendants having answered the bill, and the plaintiff having replied to such answers, it was referred to one of the counselors of this court to take the proofs of the respective parties, and to report the same, with his conclusions of fact, thereon.

The report of the referee states in substance, among other things, that the petition in bankruptcy against the said Daniel Morse, was filed at the time above stated, and that an adjudication in bankruptcy, and such other proceedings, were had thereon; that the plaintiff was duly appointed and qualified as his assignee; that thereupon all the estate, property, etc., of the bankrupt was duly assigned to him by the Register in charge of the case; that on the 3d day of April, 1868, Morse committed the acts of bankruptcy charged in the bill, viz.: that he did, on the 3d day of April, 1868, depart out of, and from the State of New York, of which he then was, and for many years preceding that date, had been, an inhabitant, with intent to defraud his creditors; and did on the same day, being a banker in the city of Lockport, in this district, fraudulently stop and suspend, and did not resume payment of his commercial paper within a period of fourteen days; that after said bankrupt had so departed from the State, and on the said 3d day of April, the defendants Scoville, and Gardner, commenced their suits against him; that on the 6th of the same month, the said defendant Harwood, and on the 18th of the same month, the defendant Stone, commenced their suits against Morse; that such suits were commenced against the said Morse by summonses only, delivered to the sheriff of Niagara county, to whom attachments in the same cases were also delivered; that on and prior to the 18th of the same month the publication of the summons, as required by the New York code, was commenced in each of said cases; that the sheriff attached the property of Morse under said attachments; that after leaving the State of New York, on the 3d of April, said Morse went to Detroit, and that prior thereto, Phineas L. Ely, an attorney

and counselor at Lockport, had been, in some instances, the attorney and legal adviser of said Morse; that, prior to the 30th day of April, said Ely had had some correspondence with said Morse about appearing for him in the aforesaid actions, and had received from said Morse copies of the summonses and complaints in said actions, with a letter from said Morse, stating that the sheriff claimed to have attached in those suits all the household furniture in his house, and that he had two infant children, and directing said Ely to insist upon his exemption, under the New York statutes; that, in consequence of the receipt of said letter and papers, said Ely appeared in said action for said Morse, for the purpose of protecting his right under the exemption laws; that, excepting as aforesaid, the said Ely had no authority to act for said Morse in said actions; that some time between the 3d and 30th days of April, 1868, said Ely arranged a meeting with said Morse, to take place on said last mentioned day at Elgin, in Canada; that said meeting was to be held for the purpose of enabling said Morse to consult with said Ely, and Judge Bowen of Lockport, with reference to his children; that said Ely informed the attorneys for the plaintiffs in said actions, that said Morse was or would be in Elgin as aforesaid, and that he should try to have him come to Lockport; that one of the attorneys for said Harwood, and Stone thereupon, and on the 29th or 30th day of April, 1868, gave to said Ely a copy of the summonses and complaints in the said actions of Harwood, and Stone to serve upon said Morse; that Elgin is situated upon the Canada side of the Niagara river, at the point where the Suspension Bridge crosses said river; that said Hiram Gardner was one of the attorneys of said Scoville in his said action; that said Gardner informed said Ely that he would like to see the said Morse, and would go with him for that purpose; that on the 30th day of April, 1868, said Ely and said Gardner went to Elgin, and that while there said Gardner handed to said Ely a copy of the summonses and complaints in the said actions of Gardner, and Scoville, for the purpose of having them served on said Morse; that, having finished their business at Elgin, the said Morse,

Ely, and Gardner left the hotel at Elgin and walked across the bridge nearly as far as the American side of the Niagara river—the said Ely, and Gardner being on their way home, and the said Morse accompanying them, at the request of the said Ely, for the sake of their society; that after reaching a point within the County of Niagara, said Ely served upon said Morse a copy of the summons and complaint in each of the aforesaid actions of Gardner, Harwood, Scoville, and Stone, against said Morse, and left the same with him; that up to that time the said Morse had had no notice of any of the aforesaid conversations, had between the said Ely, and the attorneys for the plaintiffs in said actions, or that it was the intention of said Ely, to serve said papers upon him, and that he did not procure the service of said copies of said summonses and complaints to be made upon him; that the judgments entered in said actions were entered upon proof of the personal service of the summonses and complaints as aforesaid, and not by virtue of the publication of the summonses therein; that executions upon such judgments in favor of Scoville, and Gardner were delivered to the sheriff on said 21st day of May, 1868, at 10 30 A. M., and in Harwood's, and Stone's cases ten minutes later; that the real and personal property described in the bill of complaint, constituted all the property of said Morse at the times aforesaid, and that he was indebted to other persons, beside the plaintiffs in the said judgments and executions, in the sum of about twenty thousand dollars; that at the time of the personal service of said summonses and copies of complaints, and at the time of the seizure of said property upon said executions, the plaintiffs in said suits knew, or had reasonable cause to believe, that said Daniel Morse was then insolvent, and had committed the acts of bankruptcy alleged in the complaint; that such judgments were recovered upon *bona fide* debts due from said Morse to said judgment creditors respectively; that the summonses in said actions of Gardner, and Scoville were mailed to said Morse, at Detroit, on or about the 18th day of April, 1868; that the summons and copy of complaint in favor of Harwood was so mailed to him, on or about the 10th day of April, 1868, and

those in favor of Stone, on or about the 21st day of April, 1868, and that there was, at the times aforesaid, and ever since has been, a regular communication by mail from Lockport to Detroit.

The referee also found, as conclusions of fact, from the facts before stated in his report (the most material of which are above stated), that "the said Daniel Morse did not *procure* the service of the summonses and complaints which was made on the 30th of April, 1868, as aforesaid, with a view to give a preference to any of his creditors, over his other creditors, or with the intent to procure his property to be seized in violation or in fraud of the provisions of the Bankrupt Act, but that such service was made without any procurement of the said Morse." He further found, as conclusions of fact, that "at the time of the service of the summonses and complaints, on said 30th day of April, 1868, as aforesaid, the said Gardner, Scoville, Harwood, and Stone, knew, or had reasonable cause to believe, that said Morse was insolvent, and that said service was made, and said suits were conducted, and the subsequent proceedings therein had, with the intent, on the part of said Gardner, Scoville, Harwood, and Stone to obtain the payment of their debts, in preference to the other creditors of said Morse;" and that "the said Morse did permit and suffer his property to be seized on the attachments and executions aforesaid, and a part thereof to be sold, but, that such seizure and sale were not made by his procurement, and were made without any intent on his part to defeat or delay the operation of the Bankrupt Act, or to prevent a distribution of his assets as provided in said act."

To this report of the referee the plaintiff filed twelve exceptions, the most important of which relate to and oppose the findings, in substance, that the bankrupt did not procure the service of the summonses and complaints aforesaid, and did not procure his property to be taken on said executions, with intent to give a preference to the plaintiffs in such judgments, or to defeat the operation of the Bankrupt Act.

On the hearing before the referee, Phineas L. Ely, before

mentioned, was examined as a witness for the plaintiff, and cross-examined in behalf of the defendants. He stated, among other things, that he had been in some instances the legal adviser of the bankrupt, and had, he thought, brought a suit for him within three months before the 3d of April, 1868; that he did not remember any consultation with him in regard to his matters within the three months, except the commencement of such suit, until on or about the 3d day of April, 1868, and he thought the day previous, when he had a consultation with him as his attorney and counsel; that he was afterwards informed by Morse himself, that he would be at Elgin on the 30th day of April, 1868; that between the 3d, and 30th of said month he knew that the actions of Gardner, Scoville, Harwood, and Stone were commenced; that he communicated the fact that Morse was at Elgin to the attorneys for the plaintiffs in such actions on the 29th, or the morning of the 30th of April; that he met Judge Holmes, one of the attorneys of Harwood, and of Stone, and said to him that "Dr. Morse was at the bridge in Canada; that he (Ely) was going over to see Morse, and that if he desired to communicate with him he would take over any communication;' that Holmes asked if he would take some papers and serve on Dr. Morse; that although he did not know what he replied, Holmes or his partner afterwards handed him the summonses and complaints in these actions of Harwood, and Stone, and that he took them; that upon the 29th, or 30th he had an interview with Judge Gardner (the plaintiff in one of said actions, and the attorney for said Scoville), in said Gardner's office; that he could not say how the conversation commenced, or whether Judge Gardner asked him where Morse was, or whether he (Ely) opened the conversation by telling him: that Gardner desired to see Dr. Morse, and said he would go with said Ely to the bridge, and did go; that either at Judge Gardner's office, or on their way to the bridge Gardner handed him the papers in the cases of Gardner, and Scoville, and requested him to serve them; that when he went to Elgin he and Gardner went to a public house, and found Dr. Morse there; that he thought they did not have an interview together, and

were only in the room together momentarily, when they first met there; that Gardner, and Morse then had an interview at which he (Ely) was not present; that he then went into the room where they were, and all remained in the room until he, and Judge Gardner left; that they were there from a half to three quarters of an hour; that Dr. Morse left the hotel in company with Judge Gardner and himself, and continued with them until nearly across the bridge; that when they got near the gate at this end of the bridge he served the summonses and copies of complaint in all the four actions upon Morse, and then he and Gardner came home by the cars; that he could not say whether he appeared in any of the actions for Morse, but his impressions were that he did not; that he went voluntarily to Gardner, and to Fitts (one of the attorneys of Harwood, and of Stone, and the partner of Judge Holmes), and offered to serve the summonses and complaints.

On his examination in behalf of the defendants, he testified, among things that he learned, in the first instance, that Morse was to be at Elgin, by telegram; that he never had any correspondence or conversation with Morse, or intimation from him that he was coming to Elgin, for the purpose of being served in these suits, and never had any conversation with him about coming there, or into the State for the purpose of being served with process; that Morse had not, to his knowledge, any knowledge or intimation that he was going to serve any papers upon him, or that he was about to give a preference to these creditors through any act of his; and that he did not act in the matter of serving these papers in pursuance of any understanding with him, or instructions from him.

On his re-direct examination he stated, that he found original notices of his appearance in behalf of Morse in each of the four suits, and did not doubt that copies were served on the plaintiff's attorneys respectively on the 20th of May, 1868. On his further cross-examination for the defendants, he stated that he thought he had had some correspondence with Morse, about serving notices of appearance, and that such correspondence was before the 30th of April.

Judge Gardner's testimony in respect to the matter was very brief. He testified on his examination by the plaintiff's counsel, that he handed the summonses and complaints in the Gardner, and Scoville cases to Mr. Ely in the room in the hotel at Elgin; that Dr. Morse was in the room, but he could not say that it attracted his attention, and should rather think it did not.

On behalf of the defendants he testified that there was no conversation about the papers in which Morse participated; that in all his interviews with Dr. Morse no reference was made to these debts, papers, or suits by Morse, or by Ely or himself in Dr. Morse's hearing, to his knowledge or belief.

On his re-examination on behalf of the plaintiff, he testified that his impression was that he made some remark to Ely when he handed him the papers; that soon after that, something was said about his walking with Mr. Ely, and that they talked about Morse's financial condition.

The examination of the witnesses in the case, except Morse, the bankrupt, was ended on the 30th of December, 1869, and on the 19th day of January, 1870, Morse was examined, *de bene esse*, on behalf of said defendants, before a United States Commissioner in Minnesota, without notice to the plaintiff, and of course without any cross-examination in his behalf. He then and there deposed as follows:

"My name is Daniel Morse. I am about fifty-five years of age; in April, 1868, I lived in Detroit, Michigan; I went from Detroit to the town of Elgin, in Canada, near the Suspension Bridge, on business; I went to see Judge Levi F. Bowen, in regard to becoming the guardian of my children. I went of my own act, and without communication with any person in relation to going there; I had an interview on or about the 30th day of April, 1868, with Phineas L. Ely, and Hiram Gardner, at Elgin, and I also saw Judge Bowen there in reference to the guardianship of my children. I think Ely, and Gardner came there in the evening. It was after dark. They came to the hotel where I was stopping. I saw Ely and Gardner when they first came together, perhaps not more than fif-

teen minutes. Mr. Ely remarked, I suppose you want to have a little conversation with Judge Gardner? I told him I did. Ely left the room, and was gone, I should think, about half an hour, perhaps more. We sat there some little time after that, talking on general matters; no business subject that I remember of. Mr. Ely remarked to the judge, it was time for them to go or they would lose the train, and asked me to walk with them; I went nearly across the bridge with them, and, as I stopped to bid them good night, Mr. Ely took out certain papers which he handed to me. We then parted, they going on to the shore, and I returning into Canada. I had no object in going on the bridge with them, except Ely asked me to, and to be with them as long as I could. I had no intimation or knowledge, that any papers were to be served upon me as I crossed the bridge. I did not know before I examined the papers what they were, or in what suit. I did not know at that time, nor had I any intimation, that I was about to give preference to any creditor or creditors by any act of mine. I was never asked to come into the State of New York, and the jurisdiction of said court, for the purpose of being served with process, and I never had any communication with or from said Ely, or any of the plaintiffs, their agents, or attorneys, or any other person or persons whatsoever, on that subject. No reference was made in the interview between Ely, and Gardner, and myself, to the subject of these suits."

HALL, J.—It is obvious that the efforts of the parties upon the hearing before the referee, as well as on hearing here, were mainly, if not wholly, directed to the single purpose of showing, on behalf of the plaintiff, that the case was within the express provisions of the 35th Section of the Bankrupt Act, and the judgments and executions of the defendants therefore void; and on behalf of the defendants, that the case did not fall within the provisions of that section. The finding of the referee upon the questions of fact deemed most material under these provisions, was adverse to the plaintiff; and as the case will be first considered in connection with such provisions,

the evidence bearing upon these questions will first be discussed.

It cannot be doubted that the acts of Ely in informing the attorneys of the four principal defendants in this suit, that Morse would be at Elgin, and offering to take and taking the summonses and other papers, to serve upon Morse, and afterwards procuring the momentary return of Morse to the State of New York, that he might serve such summonses upon him, and then serving the same, were intended on his part, as well as on the part of the attorneys who furnished him the papers, to give to these four defendants who had attached the property of Morse a right to enter judgments, issue executions, and seize his property thereon, in such manner as would secure to the plaintiffs in such executions a preference over the other creditors of Morse. Nor can it be doubted that if in so doing he acted with the assent and approval of Morse, so that his acts are in law to be regarded as the acts of Morse, the latter must be held to have *procured* his property to be seized on execution, so as to render the seizure illegal and void under the express provisions of said section.

In this view of the case it becomes important to consider whether Ely was in fact so acting with the assent and approval of Morse, or was guilty of treachery to his client in thus endeavoring to give a preference to the defendants in this suit, and thus defeat the operation and effect of the provisions of the Bankrupt Act.

In considering this question, and the general question whether Morse intended to aid in securing such preference to the defendants, it is to be observed that it would necessarily be the policy of Morse, and Ely, as well as of the favored creditors, to proceed with the utmost caution, and as far as possible to avoid or conceal every act, declaration, or proceeding, which would furnish evidence to defeat their purpose. Their conversation and correspondence, and, as far as possible, their acts, would be regulated by this policy, and therefore, in respect to this question, their acts, their omission to act, and their silence, are more significant than any express

declaration of theirs, and must necessarily be most relied upon in determining the questions of Ely's authority and Morse's intentions.

The proof shows that Morse was a banker, and as he was also a doctor, he was doubtless an educated and intelligent person. On or before the 2d of April, 1868, he reached the conclusion that his hopeless insolvency required some action on his part, although it does not appear that, up to that time, his creditors had taken, or contemplated taking, any proceedings against him. Mr. Ely had before been sometimes consulted by him as his legal adviser, and had lately, or at least within three months, been employed by him to bring a suit in his favor. On the 2d of April, and in view of his insolvent condition, Morse again sought the counsel of Ely as his legal adviser. Their consultation was privileged, and what then occurred between them could not be given in evidence. The condition and circumstances of Morse, as shown by the evidence, would naturally lead to the obvious conclusion that the result of such consultation would be a determination on the part of Morse to apply for the benefit of the Bankrupt Act, and secure a fair and equal distribution of all his property among all his creditors, unless he desired to give a preference to some or one of them over the others. If he desired to give such preference, Ely could inform him that the Bankrupt Act would invalidate any act of his clearly intended to produce that result, and that to effect that object some measure must be taken by the creditors in which he (Morse) should not appear to co-operate. What occurred at this consulation can only be strongly suspected; for it is evident that no entirely reliable conclusion in regard to it can be based upon the then existing circumstances, and the subsequent conduct of the parties.

On the very next day, and possibly without being influenced by anything which occurred at such consultation, Dr. Morse absconded from Lockport, and before three o'clock in the afternoon of that day the suits of Gardner and of Scoville were commenced against him by the delivery of the summonses therein, and attachments against his property, although the

publication of said summonses were not commenced until the 18th. It does not appear whether Ely or Morse had or had not communicated to these parties, or their attorneys, the fact of the intended or actual departure of Morse; but they were creditors that Morse or Ely, or both, then, or subsequently, intended to prefer, and care was subsequently taken that their judgments should be docketed and their executions issued a few minutes in advance of those of Harwood and Stone, although the services on which the judgments were entered were all made at the same time. Indeed, this matter of preference, even between those four judgment creditors, seems to have been carefully regulated and guarded. Gardner was the favorite; Scoville came next, Stone next, and Harwood the last of all. Consequently Gardner's judgment was docketed one minute before that of Scoville, so as to give him a preference as against Morse's real estate; that of Scoville, half an hour before that of Stone; and that of Stone one minute before that of Harwood; and the executions in Gardner and Scoville's cases were delivered to the sheriff ten minutes before the executions in the cases of Stone and Harwood.

The levying of the attachments in these cases did not secure the desired preferences to their favored creditors as against proceedings in bankruptcy commenced within four months after such levy, though it was only by such proceedings the lien of such attachments could be dissolved and their object defeated. To fully secure a preference, a levy on final executions on judgments obtained after personal service upon the defendant or his appearance in the suits was necessary; but a voluntary appearance without such previous service would, of itself, be almost certain to defeat the attempt to secure such preferences. This was doubtless well known to Ely and Morse, as well as to Gardner and the attorneys of Harwood and Stone. Prior to the 30th of April, Ely had some correspondence with Morse about appearing for him in these suits, and had received the summonses which had been sent to Morse by mail; but this correspondence being privileged, its precise contents and exact purposes are unknown. But it is

apparent that for some reason Ely decided not to appear in the suits, at least before personal service of the summonses upon Morse, and that his thoughts had been turned towards some other means of securing a preference to the parties who had prosecuted his unfortunate client. When this correspondence commenced, or when it ended, does not appear; but before the 30th of April, and probably before the 29th, Ely learned by a telegram from Morse himself that the latter would be at Elgin on the 30th, although Morse swears that he went there of his own act, and without communicating with any person in relation to his going there.

Ely then gave notice of that fact to the attorneys who had commenced the suits against Morse; and he procured from them, for the purpose of such service, the summonses which he subsequently served. Ely then went with Gardner and met Morse at Elgin. It is assumed that he went there to consult Morse in reference to Judge Bowen becoming guardian for Morse's children; but it does not appear that he had any such consultation, or why it was necessary or desirable that he should have one. He left Gardner and Morse alone almost immediately after they met Morse; and, although Gardner had within the same month prosecuted Morse and had attached his property in two suits which were yet pending, and there met him for the first time after such suits were commenced, it appears that these parties were careful not to speak of these suits, or either of them, during the half hour they were together. This silence can only be accounted for by the supposition that these parties understood each other, and deemed it most discreet, in view of their common object, to say nothing upon the matters apparently most likely then to be the subject of conversation, unless there was some understanding that the matter was in the hands of Ely, and that it was not discreet to interfere with his plans and purposes.

The proof in reference to the alleged motive of Morse in coming momentarily into this State, his yearning after the society of his Lockport friends, from whom he had been separated nearly a whole month, one of whom had, in the mean-

time, attached his property in two different suits, on the ground that he had departed from the State with intent to defraud his creditors, and had not mentioned this circumstance during their half hour's interview, and the other his legal adviser, the day or day before he so departed, and who was there at his request as his legal adviser in respect to the guardianship of his children, but who was preparing, as it is alleged, in collusion with those who had prosecuted his client and charged him with an intent to defraud his creditors, to effect a personal service of the summonses in those suits, so as to give such creditors a preference against the will of Morse, and the proofs in respect to the service upon Morse, and what then and there occurred, have already been sufficiently set forth.

When these papers were served, Morse either knew, or, by a single glance at them, might easily have ascertained their character. Though served by his own attorney, he made no inquiry as to the meaning and purpose of such service, and manifested neither indignation nor surprise that his own attorney and confidential adviser should have thus lent himself to the opposing parties, and, by treachery and trick, had induced him to enter the State in order that he might consummate his alleged treachery. He does not appear to have made any effort to avoid the effect of such service, or to have expressed any dissatisfaction with the conduct of his attorney. He did not seek to avoid the effect of the service by voluntarily going into bankruptcy, nor did he give notice of this service to any other of his creditors, in order that they might proceed against him in bankruptcy, within the twenty days allowed for pleading; and he does not appear to have consulted with any one, in regard to any measure to counteract the efforts of Ely, and of the creditors by whom he had been prosecuted.

He was not an ignorant man unaccustomed to business, and he had consulted counsel upon other and recent occasions. It is assumed that he required the legal advice of Ely, even in his consultation with Judge Bowen, in regard to the guardianship of his children, and, unless he was a willing participant in these proceedings through Ely, his attorney, it is passing strange that

he neither did, nor attempted to do, or even said anything, in disaffirmance or disapprobation of the conduct of Ely, or consulted with any one in respect to the measures proper to be taken to defeat the purposes of those who had prosecuted him.

Acta exteriora indicant interiora secreta: The law judges of a man's previous intentions by his subsequent acts. (Broom's Legal Maxims, 139.) *Omnes ratihabitio retrotrahitur, et mandato priori æquiparatur:* Subsequent assent given to what has already been done has a retrospective effect, and is equivalent to a previous command. (*Ibid.*, 380.) *Qui non prohibit quod prohibere potest, assentire videtur:* He who does not prevent that which he can prevent, is held to assent. *Qui tacet consentire videtur:* Silence implies consent, and such consent may be inferred from the party's subsequent conduct. (*Ibid.*, 360.) *Qui facit per alium, facit per se:* He who does a thing by another, does it himself (*Ibid.*, 373), are ancient, reasonable, and well-established legal maxims, and may be properly applied in this case.

If the services made upon Morse, on the suspension bridge, were brought about by the fraud and treachery of his attorney, acting in collusion with the attorneys of the opposite parties and in opposition to the will of Morse, the Supreme Court, in which the actions were pending, would doubtless have set aside the services. (Graham's Practice, 2d Edition, 137; *Williams* v. *Bacon*, 11 Wend., 636; 2 Kent's Com., 483, note b.) Morse, by filing his own petition as a bankrupt, might have avoided the effect of such services; or he might, by communicating the facts to some of his other creditors, have enabled them to effect the same object, by filing a petition against him during the twenty days allowed him to plead, but he did nothing of the kind, and seems to have rested in perfect contentment with the preference which he supposed Ely had secured to the four creditors who had prosecuted him.

In short, the conduct of Morse and Ely, before, and at, and after the time of the service of the summonses upon Morse, satisfies me that Ely was acting as the attorney and agent of Morse, without special instructions to do certain specific acts, but with

the understanding and assent of Morse that a preference should, in some way, be secured to these judgment-creditors, Morse relying upon Ely to engineer the matter, and consenting to do what Ely requested. Ely, when he gave the information of Morse's expected visit to Elgin, and obtained the summonses, doubtless relied upon Morse's willingness to aid his purposes and come momentarily into Niagara county, if he requested it, and he expected him to so act that these creditors, and no others, should obtain service of their process upon Morse.

The conclusions just stated were resisted by the counsel for the defendants upon the ground that they were disproved by the testimony of Ely and Morse; and it was, doubtless, upon their testimony that the opposing conclusions of the referee were based. But their testimony does not fully meet the question, and is not necessarily a denial of what has been assumed. Their language seems to have been well considered, and what they have each sworn to in very nearly the same language, in respect to the service of the summonses, may be literally true, notwithstanding that Morse desired and intended that Ely should, in some way, secure the preference attempted to be given, and therefore accompanied Ely, at his request, until he reached the New York portion of the Suspension Bridge, to enable Ely to take such action as he desired to produce that result.

These views require a modification of the referee's report, but there is, perhaps, no necessity for a formal allowance of the exceptions. The second, seventh, eighth, and tenth exceptions are, however, considered to be well taken, and, as the allowance of these will correct the report so far as it may be necessary, the other exceptions may be considered as disallowed.

Of course, under the views already expressed, the plaintiff is entitled to a decree, but there is another and most important question involved in the case, upon which, in view of its great and general importance, I should probably have ordered an argument if the plaintiff had not been entitled to a decree upon other grounds.

It can scarcely be doubted that an act which directly and

manifestly tends to defeat the purposes and policy of the Bankrupt Act, and which was done in contravention of and with the intent to defeat such purposes and policy, is, for that reason, fraudulent and void. "A fraudulent contrivance," said Lord Mansfield, in *Rush* v. *Cooper*, 2 Cowper, 629, "with a view to defeat the Bankrupt Laws, is void, and annuls the act." And in *Foster* v. *Goulding*, 9 Gray's Reports, 50–52, it was said by Thomas, J., after quoting the above language of Lord Mansfield, "This is well-settled doctrine, and, diligently and faithfully applied, would defeat most of the contrivances and indirections by which the just and equal operation of the insolvent laws is prevented." And see the cases cited by Judge Thomas on p. 53.

In this case the acts of Morse, upon which the attachments issued against him in favor of the defendants, were acts of bankruptcy under the Bankrupt Act, and in the case of *Shawhan* v. *Wherrit*, 7 Howard's Rep., 627, Mr. Justice Grier, in delivering the unanimous opinion of the Supreme Court of the United States, said: "The chief and important question involved in this case is whether the appellants, after an act of bankruptcy, of which they had full knowledge, could, by proceeding in a State court, obtain a valid lien and seize the property of the bankrupt to the exclusion of his other creditors, or whether such a proceeding would not be a fraud on the Bankrupt Law, and therefore void."

In discussing that question he further said, among other things: "The acts thus enumerated (acts which were deemed acts of bankruptcy under the Act of 1841) are usually termed acts of bankruptcy, and may be considered as tests of insolvency, showing conclusively the inability of the trader to pay his debts, or carry on his trade. The policy and aim of bankrupt laws are to compel an equal distribution of the assets of a bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, *or by a race of diligence*, obtain a preference to the injury of others. Such conduct is considered a fraud

on the act, whose aim is to divide the assets equally, and therefore equitably." Again: "A creditor may always recover and receive payment of his debt, or security for it, from his debtor, unless he has notice or knowledge that his debtor has committed an act of bankruptcy, and then he is forbidden to receive payment of his debt, or to obtain any other priority or advantage over the other creditors of the bankrupt. And if notice of this fact to the creditor makes a payment by the debtor void, it is obvious that a security or priority gained by suit in a State court, after such notice, could have no better claim to protection, for notice of the act of bankruptcy to the creditor is the test of *mala fides* which vitiates the transaction."

In *Shawhan* v. *Wherrit*, the lien asserted was based upon the filing of a bill in equity against the bankrupt and his assignee, under a voluntary assignment professedly made for the benefit of creditors, and a subsequent decree upon the bill so filed. The bill was filed on the 2d of May, 1842, and the petition in bankruptcy was not filed until the 24th of the next September. A decree in favor of the complainants in the State court was entered on the 22d of the succeeding month of October, and on the 4th of the next month the adjudication in bankruptcy was made in the Bankruptcy Court. The bill of the assignee in bankruptcy, under which the decision of the Supreme Court of the United States was made, was not filed until August, 1843. The bill was filed in the District Court, and that court entered a decree in favor of the complainant. This decree the Circuit Court affirmed on appeal in November, 1844, and the decision of the Circuit Court was affirmed by the Supreme Court in 1849. The case was ably argued in that court, and the opinion of Mr. Justice Grier appears to have had the full concurrence of all the judges of that court.

The lien asserted in that case was based upon proceedings in equity, and those asserted in this case are based upon proceedings at law. That case arose under the Act of 1841, and this under the Act of 1867. But I have not been able to discover, in the reasoning of Mr. Justice Grier, or in the somewhat different language of the two acts, any ground for assum-

ing that the liens insisted upon in this case are not void under the decision made in the case of *Shawhan* v. *Wherrit*. Indeed, the learned Judge of the Southern District of New York, in his well-considered opinion in the case of Black and Secor, 1 N. B. R., 353, applied the doctrine of *Shawhan* v. *Wherrit*, in a case where the creditor had obtained a judgment, execution, and levy by the neglect of the bankrupt to file a voluntary petition in bankruptcy, and he declared that the doctrines of *Shawhan* v. *Wherrit*, held to be applicable to the act of 1841, are much more applicable to the act of 1867. The case of Black and Secor is, in fact, an authority in point against the defendants, and there are other cases which tend to support the same doctrine. *In re* Belden, 2 N. B. R., 42.; *In re* Black and Secor, 2 N. B. R., 171; *Fitch* v. *Magee*, 2 N. B. R., 531; *In re* Wells, 3 N. B. R.

The plaintiff will have a decree in accordance with this opinion.

Farnell and *Brazee*, for plaintiff.

George Gorham, for defendant.

UNITED STATES DISTRICT COURT.—N. D. OHIO.

W., on petition of his creditors, was adjudged a bankrupt, being at the time of the adjudication the owner of a dwelling-house covered by a policy of insurance, containing the following clauses: "If the title of the property is transferred, or changed," or, "if the policy is assigned, this policy shall be void." The building was destroyed by fire after the transfer by the Register to the assignee.

Held, that such transfer, being by operation of law, did not avoid the policy, and that the assignee is entitled to recover the insurance money.

STARKWEATHER, *Assignee of* WELLS, *v.* THE CLEVELAND INSURANCE COMPANY.

SHERMAN, J.—The petition states that on the 7th day of February, 1870, Newton Wells, on the petition of his creditors, was declared by default a bankrupt, and that the petitioner was thereafter duly appointed his assignee. That on the 25th day of July, 1868, the defendant issued to Newton Wells, the said

bankrupt, a policy of insurance in the sum of fifteen hundred dollars on his house in Concord, Lake county, Ohio, for the period of three years from that date. That on the 8th day of May, 1870, and within the life of the policy, but after Wells was adjudicated a bankrupt, and the assignee appointed, the premises were destroyed by fire.

The answer of the insurance company does not deny the loss, or the sufficiency of the proofs, but bases its defense on two clauses in the policy, which read thus: "If the title to the property is transferred or changed, this policy shall be void." And, "If without the written consent of the company this policy be assigned, it shall be void." The direct question presented the court for adjudication, is this: Is the assignment of the Register to the assignee both of the policy and of the property insured a violation of these two covenants in the policy, and does it exonerate the company from liability? It is claimed by the petitioner that his assignment and transfer were not the voluntary acts of the bankrupt, but merely an assignment by operation of law, and that there is a broad distinction recognized by the authorities between the voluntary and the involuntary assignments and transfers of the policy and title. It is claimed by the defendant that a policy of insurance is a contract of personal indemnity, in no manner incident to the estate, nor running with it, and that the language of this policy is broader than the common and usual clauses against alienation, and includes in it any voluntary change or transfer of title.

It may be premised that as the covenants in this policy are in restraint of alienation, and entail a forfeiture, they must be strictly construed. Though a contract voluntarily entered into by the parties, no other meaning should be given to the language used than a most rigid and liberal interpretation permits. 15 John. Rep., 276; 2 Wilson's Rep., 234. The clauses against the assignment of the policy, and against the transfers and change of title, may be considered together. The rules that apply to either, apply to both. These covenants are common to all insurance contracts. All policies have the same clause

forbidding the assignment of the policy. The covenant against change or transfer of title in different policies varies somewhat in phraseology. In some policies the language used is, "sold or conveyed in whole or in part;" in others, "shall not be alienated by sale or otherwise;" or, as in this, "the title shall not be changed or transferred." All these expressions are in substance the same. To sell and convey, to alienate or transfer the title, means an act whereby a thing is made another man's; an act whereby a change in the ownership of property is made from one person to another. And whether these words are used in the active or passive sense can make no difference in their construction. These covenants, therefore, on the part of the assured, are that he will not assign the policy, or in any manner change his title to, or the ownership of, the property insured.

I can find no decisions under the present Bankrupt Law bearing upon the case at bar. The question must, therefore, be decided upon principle and by the lights derived from decisions upon analogous questions.

It is not to be doubted that the petitioner, by virtue of the adjudication in bankruptcy, and his appointment as assignee, has the control of this policy and of the property therein insured. What rights and what title did he thereby acquire? Assignees, according to Bouvier's Law Dictionary, Vol. I., p. 132, are of two kinds: one in fact, and one in law. An assignee in fact is one to whom an assignment has been made in fact by the party having the right to assign. An assignee in law is one in whom the law vests the right and control in the property. To the latter class an assignee in bankruptcy belongs. He is like an administrator, executor, or guardian, upon whom, when appointed by the proper authority, the law confers the right and power to control the property thus committed to his charge, paramount to all others. But it does not give to, or vest in him, the absolute ownership in his own right to the property. He is a mere trustee, accountable under the law to the *cestui que trusts*. He holds the property assigned to him in trust, and takes possession, by virtue of the law, of all leases

and policies, as well as other property. In leases with covenants against alienation without consent, etc., it has always been held that the leases pass to the assignee, and this by virtue of the Bankrupt Law. Nay more, it has been held, 2 Chitty, 600, that in such case, the assent of the leasor to such assignment is to be presumed from the law itself. This doctrine is nothing but the simple enunciation of the principles laid down by Lord Ellenborough in *Copeland* v. *Stevens*, 1 B. and Ald., p. 592. In substance he declares that the assignee is only a mere agent for the bankrupt and for his creditors. He says: "An assignment by the Commissioner of Bankruptcy is the execution of a statutory power given them for a particular purpose, namely, the payment of the bankrupt's debts. Nothing passes from them, for nothing was vested in them. Whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute. * * * The object of the statute, and of the assignment, is the payment of the bankrupt's debts, and the assignee is trustee only for that purpose."

Again, in 9 Vesey, 100, and 13 Vesey, 186, the Lord Chancellor declares that "Assignees are not considered as having the same rights as purchasers for a valuable consideration, and that they are placed in the same class as personal representatives of intestates." Of course I need not quote authorities to show that, Wells dying, this policy, notwithstanding its covenants, would pass to and vest in his administrator. From these cases the principle is clearly deduced that an assignee in the case of involuntary bankruptcy is only a trustee, an agent, standing in the shoes of the bankrupt, with only power to do what the bankrupt ought to have done, namely, pay the debts out of his assets. By the provisions of the Bankrupt Law, the Register makes the assignment and not the bankrupt. The latter makes no paper and performs no act to divest him of the title. But the control of this property, merely and solely by judgment of the court, is taken from him and vested in the assignee, who has merely the power to do what the general as well as the Bankrupt Law requires, namely, to appropriate the bankrupt's property to the payment of his debts. In other

words, that the assignee is a mere agent of the debtor to use his property in the payment of his debts. It therefore follows from this, that the bankrupt remains as much interested in watching over and guarding the insured property after as before bankruptcy, and that the assignee does not acquire such an interest in the policy, nor in the insured property, as to work the forfeiture contemplated by the clauses in question. Phil. Ins., 107.

This conclusion will be further strengthened by a review of the cases upon the effect of an involuntary act of bankruptcy upon the breaches of covenant in insurance and other like contracts. Parsons, in his work on Contracts, 2d vol., 451, says: "On general principles, that where property, insured against fire, is taken into the possession of the law, for the benefit of creditors, the insurance will remain valid, until the property is sold by the assignee." The case of *Bragg* v. *New England Insurance Company*, 5 Foster's Rep., 289, was a suit brought on a policy which contained a clause that, "if the property shall in any way be alienated, the policy shall be void." The property was mortgaged at the time, and this fact communicated to the company. During the life of the policy, the mortgage was foreclosed and the property sold. But the court said "that the title that became vested in the mortgagee by the foreclosure was brought about by the operation of law. There was no act or conveyance or transfer by the mortgagor to the mortgagee. We cannot, therefore, regard the foreclosure and sale as an alienation." In the case of *Smith* v. *Putnam*, 3 Pick., 220, there was a lease of a farm, with a covenant not to carry off any hay, under a forfeiture of ten dollars per ton. Hay was attached and carried off by the creditors of the lessee, and without his consent. In this suit for the forfeiture the court said "that the general principle to be deduced from all the cases was that covenants not to assign, transfer, etc., are broken only by a voluntary transfer by the lessee. That the removal of the hay by sale or execution, was not a voluntary act of the lessee, and therefore no breach of the covenant." The leading case in England will be found in 8th Term Rep., 57. Suit was

brought on a lease, which contained a covenant that the lessee "should not set over, assign, transfer, in any way dispose of the lease, without the written consent of the lessor." The lessee confessed judgment, and upon execution issued thereon, the lease was sold. Lord Kenyon said: "I adopt the distinction between those acts which the party does voluntarily, and those that pass *in invitum*. Judgment, in contemplation of law, always passes *in invitum*, and therefore there is no breach." The same doctrine was held thirty years before, and will be found in 8 Wils., p. 234.

In the case of *Wilkinson* v. *Wilkinson*, 10 Eng. Ch'y Rep., 258, a father by will gave his son the rents and profits of certain premises, with a proviso, that if the son assigned or disposed of or otherwise encumbered the property he shall forfeit the estate. The son afterwards became bankrupt. Sir W. Grant, in deciding the case, says: "Now courts of law have held that an assignment by operation of law, which bankruptcy is, is not an alienation within the meaning of a restraint against alienation."

Hilliard, in his work on Bankruptcy, p. 141, sums up the law in these words: "Property may be limited or leased to be void or revert back in the event of bankruptcy, and if a lease to a trader contain such proviso, the term does not pass to his assignee, but reverts back. But to prevent its passing, there must be an express proviso to that effect. The usual covenant or proviso not to let, assign, or transfer, without consent, etc., will not be sufficient. The commissioners may still assign the lease to the assignees, without such consent, and that such consent is presumed by operation of law. The distinction, however, is taken in England that, unlike bankruptcy, which is an involuntary proceeding, insolvency, being a voluntary proceeding on the part of the debtor himself, is a breach of the covenant against assignment, and works a forfeiture."

On these authorities it seems clear to me that the clauses in this policy forbidding its assignment, and the change and transfer of the title to the property, have no more effect than similar words in leases. Both are contracts between two persons, with

this difference, that leases are under seal, and therefore of a higher nature. The cases cited establish the doctrine that bankruptcy and judgments are involuntary, and do not avoid covenants against assignments and transfers, either in leases or policies of insurance.

In this case the bankruptcy of Wells, the owner of the policy and the property, was involuntary. By operation of the law the policy and property were taken out of his custody and control, and placed in the hands of the assignee, as the agent of the law, to sell the same and pay his debts. The entire interest in the property is sold under the law by the assignee. The loss provided for in this policy accrued while the property was in this condition. It was still in law Wells' property, but by operation of law in the hands of the assignee for the sole purpose of selling and of applying the proceeds for Wells' benefit.

Decree for petitioner.

S. O. Griswold and *S. Starkweather*, for petitioner.

Willey, Cary & Terrell, for defendants.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

When the bankrupt under a general contract has rendered partial service, but has not completed the contract prior to the filing of the petition, but subsequently fulfills the same, unless the contract for payment was contingent upon full performance of the services, the compensation will be apportioned between the assignee and the bankrupt, in proportion to the value of the services rendered before and after the bankruptcy.

In re JONES.

THIS was a motion by the assignee to require the bankrupt to give the assignee the requisite authority to enable him to collect a fee of one thousand dollars which had been allowed the bankrupt for professional services in a partition suit.

The bankrupt had been retained to bring and conduct a suit for partition of real estate, and to have the share of plaintiffs

set off to them. There was no contract for the amount of the fee. Interlocutory judgment for partition was rendered June 22, 1869, and the petition was filed by the bankrupt in July, 1869. After the petition the bankrupt continued his attendance on the case, appeared before the commissioners, and procured the confirmation of the report, and in November, 1869, the court taxed in his favor, to be paid out of the fund, a fee of one thousand dollars.

It was contended by the assignee that the fee was carried when the judgment of partition was entered, and that the subsequent proceedings were the work of the commissioner, whose duty it was to make the partition; while for the bankrupt it was urged that the contract was indivisible, and that nothing was really earned until all the services necessary to finally close the case had been rendered.

Testimony was offered to show the value of the services rendered before and after the filing of the petition in bankruptcy.

TREAT, J.—The contract of the bankrupt appears to have been that of an ordinary retainer to conduct a cause, and his compensation was not contingent upon his final success, or upon the final proceedings in the petition. He was, therefore, entitled to be paid for his services as he rendered them. For the services rendered before filing his petition he had a claim upon his clients, and that passes to the assignee, but he was not compelled to work for the assignee after the bankruptcy, and for the value of services subsequently rendered in the cause he is entitled to retain the compensation.

Upon the evidence in this cause the assignee will be allowed three hundred dollars, and the remaining seven hundred dollars the bankrupt may retain, upon executing to the assignee the necessary orders to enable him to collect the three hundred dollars from the partition suit.

UNITED STATES DISTRICT COURT—ARKANSAS.

Where the bankrupts had knowledge of facts sufficient to bring home to the minds of reasonable men knowledge of their insolvency, they (the bankrupts) must be held to have had that knowledge, and the mortgaging and transfer to a creditor, with knowledge of these facts, of their stock of goods is in fraud of the Bankrupt Act, and an assignee in bankruptcy can maintain an action of trover to recover the value of the property.

The word "insolvency," as used in the present Bankrupt Act, must be construed to mean, not an absolute inability to pay debts at some future time, upon the settlement and winding up of the party's affairs, but a present inability to pay, as debts mature in the ordinary course of business, although this inability be not so great as to compel an absolute suspension.

The proposition is untenable that a debtor ceases to be insolvent because, being unable to pay his debts as they mature, creditors have agreed to extend the time of payment; also, that the payment of a debt by an insolvent cannot be regarded as a preference, if made with the hope and expectation by the debtor that he will eventually be able to pay.

The conveyance of the whole of the property of a party to one creditor to secure a pre-existing debt is fraudulent and void, and the party must be presumed to have known the natural consequences of his own act; and the intent to prefer may be inferred from the fact of preference.

A conveyance not made in the usual and ordinary course of business of a debtor is *prima facie* fraudulent and void. The phrase "usual and ordinary course of business," construed.

The doctrine of preference by a creditor to force the giving of security for the payment of a debt is not applicable under the present Bankrupt Act, and it is no answer when a debtor mortgages his property to secure such a debt to say that he was "pressed" to do it.

His duty is to file a petition in bankruptcy, so that his assets can be equally distributed.

Where a party knows at the time of purchasing goods that the bankrupts had failed in business, and that his vendors held the goods under mortgage from the bankrupts, these facts are sufficient to put him upon his guard, and he is bound to inquire into the transactions between the bankrupts and his own vendors.

To constitute a *bona fide* purchaser for value, he must not only show that he had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities.

RISON, *Assignee of* HEDDENS & MCDIARMID, *v.* KNAPP.

CALDWELL, J.—This is an action of trover, brought by the plaintiff, as assignee in bankruptcy of Heddens & McDiarmid, against the defendant Knapp, for goods of the bankrupts converted before they were adjudicated bankrupts. The defendant filed his plea of "not guilty," and the parties, by agree-

ment, have submitted the questions of fact as well as of law, to the court.

The material facts in the case are these: Heddens & McDiarmid, the bankrupts, purchased an old stock of general merchandise, and commenced business as retail merchants in the city of Little Rock, in September, 1866. In February, 1867, they were indebted to W. W. Walton, or his assignees, on account of the purchase of their original stock, in the sum of four thousand dollars, and one of the partners, Heddens, was indebted to the same party on the same account in the sum of five hundred dollars. They were also indebted to Chambers, Sterns & Co., of Cincinnati, Ohio, for goods purchased, in the sum of two thousand two hundred and sixty-seven dollars and ninety-seven cents, and to Prichard, Alter & Co., of Cincinnati, for goods purchased, in the sum of five hundred and ninety-five dollars and fifty-five cents.

In February, 1867, the firm notes for all of this indebtedness (except the five hundred dollars) were outstanding and overdue, and suit had been brought in the Circuit Court of the United States for this district against the firm, on the notes payable to Chambers, Sterns & Co., and to Prichard, Alter & Co., and against Heddens on the five hundred dollar note; and about this time the creditors of Walton sued out writs of garnishment against them, on account of their indebtedness to Walton. They were also indebted at this time to Campbell & Strong, cotton-factors at New Orleans, in and about the sum of five thousand dollars for money advanced on cotton, and to Barnes & Bro., of Little Rock, in the sum of two thousand dollars on cash account.

Finding themselves in embarrassed circumstances and unable to meet their commercial paper, one of the bankrupts, McDiarmid, testifies that he went to New Orleans about the 1st of March to see Campbell & Strong and, if possible, obtain from them some further advances, to enable them to pay off their Cincinnati indebtedness, on which suit had been brought, and which would probably go into judgment early in April.

This witness says he represented to Campbell & Strong that

they (the bankrupts) had in their store, at Little Rock, a stock of goods worth about ten thousand or twelve thousand dollars; that they owed to Cincinnati houses about three thousand dollars, that suits had been brought on these claims and judgments would probably be obtained about the 8th of April.

The witness says he told Campbell & Strong about the four thousand dollars indebtedness to Walton, but stated to them that they (the bankrupts) had a set-off against this indebtedness. What this set-off was does not appear, and it does not appear that the bankrupts had any valid defense to any part of this indebtedness. Nothing was said to Campbell & Strong about the two thousand dollars indebtedness of the bankrupts to Barnes & Bro., or the five hundred dollars indebtedness of one of the partners, Heddens, to Walton.

After making this statement of their affairs, the witness says he proposed to Campbell & Strong, that if they would make a further advance of three thousand dollars, to enable his firm to discharge the Cincinnati debts, they would mortgage or convey to Campbell & Strong their stock of goods to secure the five thousand dollars then due, as well as the amount of the new advance.

Campbell & Strong referred the matter to their attorneys at Little Rock, writing them as follows:

"NEW ORLEANS, 12th March, 1874.

"Per McDIARMID.

"SAMUEL W. WILLIAMS, Esq., or
CLARKE, WILLIAMS & MARTIN, Little Rock, Ark.

"GENTLEMEN:—Mr. McDiarmid, of the house of Heddens & McDiarmid, of your city, is now here, and we have settled with them, and find due us cash advanced on cotton, six thousand five hundred and seventy-one dollars and fifty-eight cents: for which we have taken their notes at thirty and sixty days (half each); against which, they now have in our hands nineteen bales of cotton, which, when sold, will apply on first note, say, probably, two thousand one hundred dollars; leaving due us about four thousand four hundred and seventy-one dollars and fifty-eight cents, for security of which they have agreed to

make over to us their entire stock of goods in their store at Little Rock, which they say will amount to fifteen thousand dollars. H. & McD. are owing a debt of two thousand seven hundred dollars to two houses in Cincinnati, who have sent on their claims to force collection, and will, as they say, go into judgment against them at your next term of court, 8th of April next, and which they (H. & McD.) say they can put off payment of till December next, by giving our acceptance.

"They represent to us that all they owe is this debt of two thousand seven hundred dollars. Now, we wish you to take an assignment of their entire stock of goods to us, to first secure the four thousand four hundred or four thousand five hundred dollars now due us, and allow them to go on with this business as before (if such a thing can be done safely), and if you can get abundance of security over and above the amount now due us, we will accept for them for the amount of two thousand seven hundred dollars, at nine months.

"On receipt of this you will please call on them and learn all the particulars of their business, their standing, etc., and take the security as before stated, or in any way they can secure us to your satisfaction. They desire to first secure us before these claims from Cincinnati are put in judgment against them, or if we can be made perfectly safe, we are willing to go on their paper for two thousand seven hundred dollars at nine months, in which case they will continue their shipments of cotton to us as before, and not draw for more than half the value of shipments till they get the four thousand four hundred dollar debt paid, and the acceptance of two thousand seven hundred dollars they can meet in the fall by shipments of cotton, or cash payments through the summer.

"They are wanting about three hundred dollars worth of dry goods now, which we will purchase and ship them per first boat; besides, Mr. McDiarmid wants seventy-five dollars to go home with, which we will let him have, and which will increase their account about four hundred dollars. We suppose they now have a shipment of cotton on the way, as we are just presented with another of their drafts at five days for

six hundred dollars. Our young man, Mr. James H. Pashal, is in your part of the country, and will call and see you. You can show him this letter, and confer and advise with him and with us at your earliest possible convenience. To sum up, if an assignment, transfer, or sale of their stock of goods to us can be legally made, so as to secure first their present indebtedness, and meet the further acceptance of two thousand seven hundred dollars to be granted them, please take the same in a proper shape. Your immediate attention to this and your early reply are particularly requested.

"Very respectfully yours,

"CAMPBELL & STRONG."

The bankrupts made substantially the same statement to the attorneys of Campbell & Strong in this city, in relation to their affairs, that had been made by McDiarmid to Campbell & Strong in New Orleans. The evidence does not show whether the attorneys of Campbell & Strong made any effort to verify the correctness of the bankrupts' statements as to the value of their stock of goods, or the amount of their indebtedness; but on the 21st of March the bankrupts executed and delivered to the attorneys of Campbell & Strong a bill of sale of their entire stock of goods. The preamble to the bill is as follows: "Whereas we, Heddens & McDiarmid, are indebted to Campbell & Strong, of New Orleans, La., in about the sum of four thousand dollars; and whereas, we desire further advances to the amount of say three thousand dollars, which the said Campbell & Strong agree to advance by accepting our drafts due the 1st day of January next, *provided the property hereinafter conveyed shall be sufficient to secure the same, together with our present indebtedness, as aforesaid.*"

Following this preamble is a conveyance of the stock of goods for the purpose of securing and paying said indebtedness and any advances that may be made.

The trustee mentioned in this conveyance, George Kingsbury, had been the clerk of Heddens & McDiarmid ever since they had been in business. After this conveyance, Heddens

& McDiarmid continued in the store, as before, and in the language of the witness, Kingsbury, "drew their living from it, and paid their small debts about town out of it." Immediately, or very soon after this conveyance was executed, an invoice of the goods was taken, when it appeared that there was not more than six thousand or seven thousand dollars worth of goods in the store, valuing them at cost price, and that many of the goods were old, and had been purchased in 1865 and 1866, when goods were very high, and their actual cash value at the time the invoice was taken was not more than three thousand or four thousand dollars.

The trustee, Kingsbury, knew the character and value of the goods before and at the time of the conveyance, and could, and would have imparted the facts to Campbell & Strong, or their attorneys, if he had been applied to for that purpose.

Campbell & Strong never made any advances to Heddens & McDiarmid after the goods were conveyed to them. On the 9th day of April, Heddens & McDiarmid mortgaged the same stock of goods (subject to the previous conveyance to Campbell and Strong) to Barnes & Bro., to secure an indebtedness of two thousand two hundred dollars. Barnes & Bro. had full notice of the condition of the bankrupt's affairs at the time they took their mortgage. Neither Heddens nor McDiarmid had any individual property, and the stock of goods comprised all the partnership assets except their book of accounts, amounting nominally to about two thousand dollars, but of which only three hundred or four hundred dollars were collectible or of any value.

McDiarmid, one of the bankrupts, swears that he did not consider the firm broken up or insolvent at the date of these transactions, and that they expected to be able to continue in business if they could get Campbell & Strong to advance them three thousand dollars to pay off their Cincinnati debts, then overdue and in suit. On the 29th day of May, Campbell & Strong and Barnes & Bro., claiming the property under the mortgages made to them respectively by Heddens & McDiar-

mid, sold the goods in question to the defendant, Knapp. Knapp was to pay three thousand five hundred dollars for the goods, for which sum he executed his notes, payable in six and nine months from date. He paid nothing down, and has paid nothing on the notes, and don't expect to pay if this suit goes against him.

The parties from whom Knapp purchased the goods still hold his notes, and they are overdue. Knapp knew of the failure of Heddens & McDiarmid at the time he purchased, and the marshal levied on the goods as the property of Heddens & McDiarmid about thirty minutes after he acquired the possession under his purchase.

On the 15th day of August, 1867, Heddens & McDiarmid were adjudicated bankrupts on the petition of their Cincinnati creditors, and the plaintiff in this case was afterwards duly appointed their assignee. The proof establishes, beyond doubt, the utter insolvency of Heddens & McDiarmid at the date of these transactions. They had no individual property, and the goods in the store and their book accounts composed their entire partnership assets.

The goods were not worth, at the date of their sale to Campbell & Strong, over five thousand dollars. The weight of evidence shows that this sum could not have been realized from their sale, in the ordinary course of business, and the store accounts did not exceed four hundred dollars in value. At the same time, their debts amounted, in the aggregate, to fourteen thousand dollars.

But it is said the bankrupts were ignorant of the actual condition of their affairs, and honestly believed they would be able to continue their business and pay their debts, and that the sale to Campbell & Strong was made to enable them to do this; that the term "insolvent," as used in the Bankrupt Act, means one whose business is actually broken up for want of means to carry it on, and not a mere present inability to pay debts in the ordinary course of business—that a merchant may not be able to pay his debts as they mature, and still not be insolvent, and that a merchant so circumstanced, and entertaining an honest

belief of his ability to ultimately pay his debts, may lawfully do what the bankrupts did in this case.

The bankrupts had full knowledge of the condition of their affairs; they knew the amount of their indebtedness, and they knew they had no assets except their stock of goods. They knew the character, cost, and value of these goods, for most of them had been on their shelves more than a year, and they must have known what is so clearly established by the testimony, that the receipts from the sale of this stock of goods, in the ordinary course of business, would not more than pay the rent of the storehouse and defray the current expenses, which were drawn, and expected to be drawn, from the store, and that they would cease to do this in a short time.

Grant that the bankrupts believed they would be able to support their families, pay all the current expenses of their business, and discharge some fourteen thousand dollars of indebtedness with an old stock of goods, the actual value of which was less than one-half of the amount of their indebtedness. Can a belief so chimerical, however honestly entertained, alter the facts?

Whatever their belief was, the fact of hopeless insolvency remained, and having knowledge of facts sufficient to bring home to the minds of reasonable men knowledge of their insolvency, they must be held to have had that knowledge. *Merchants' National Bank of Hastings* v. *Truax*, 1 N. B. R., 545.

The words "insolvent, or in contemplation of insolvency or bankruptcy," in this act, are not to receive the interpretation put upon the words "in contemplation of bankruptcy," occurring in the 2d Section of the Bankrupt Act of 1841.

Different interpretations were placed upon the words "in contemplation of bankruptcy" in the Act of 1841, in different circuits. In some circuits they were held to mean contemplation of insolvency, an inability to pay as debts should become payable, whereby his business would be broken up. In another circuit, it was held the debtors must contemplate an *act of bankruptcy*, or a decree adjudging him a bankrupt on his own petition.

The latter interpretation was finally given to them by the Supreme Court. *Buckingham* v. *McLean*, 13 How., 150. In this case the Supreme Court define "contemplation of insolvency" to mean "inability to pay as debts become payable, whereby the business would be broken up." And it was here settled that "contemplation of bankruptcy" meant something more than insolvency. *Carr* v. *Hilton et al.*, 1 Curtis, C. C. Reports, 224.

The 35th Section of the Act of March 2, 1867, is almost identical with Sections 90 and 91 of the Insolvent Act of Massachusetts. See appendix to Hilliard on Bankruptcy, p. 466.

The words in question, "insolvent, or in contemplation of insolvency," are used in the 35th Section of the Bankrupt Act, in precisely the same connection that they occur in the Massachusetts Insolvent Law; and Congress, having adopted the very words of that law, and those words having received an interpretation by the Supreme Court of that State, which was well known and understood at the time the Bankrupt Act was passed, it must be held (in the absence of something showing a contrary intention), that they were intended to have the same meaning, and receive the same construction given to them in that State.

And the Supreme Court of Massachusetts has held that the term "insolvency," as used in the Insolvent Act of that State, when applied to traders, does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up of his affairs, but a present inability to pay in the ordinary course of his business, and that a trader is insolvent, when he cannot pay his debts in the ordinary course of business, as men in trade usually do, although his inability be not so great as to compel him to stop business, and although he may be able to pay his debts at a future time, upon the winding up of his concerns. *Thompson* v. *Thompson*, 4 Cush., 127; *Lee* v. *Kilburn*, 3 Gray, 594; and Hilliard on Bankruptcy, v. 2; Kent's Com., 10th ed., 509, note a; *Vernard* v. *McConnell et al.*, 11 Allen, 505.

In the last case cited, Chief Justice Bigelow, speaking for the Supreme Court of Massachusetts, says: "Nor can it be doubted that the appellant was insolvent, in the legal sense of that word, if he was unable to pay his debts as they fell due, according to the usage of the trade in which he was engaged, and of the place in which he carried on his business in ordinary times and under ordinary circumstances, notwithstanding many others employed in similar occupations may also have been in a like condition of insolvency. The proposition cannot be maintained consistently with the established rules of law, that a debtor ceases to be insolvent because, being unable to pay his debts in the regular course of business, his creditors have entered into an agreement to extend the time of payment of their debts; or that the payment of the debt by a party who is insolvent, cannot be regarded as a preference if made with the hope and expectation by the debtor that he will be able, eventually, to pay all his debts in full. The adjudicated cases leave no room for doubt on these points. *Thompson* v. *Thompson*, 4 Cush., 127; *Lee* v. *Kilburn*, 3 Gray, 594; *Halbrook* v. *Jackson*, 7 Cush., 136, 149; *Barnard* v. *Crosby*, 6 Allen, 327."

And the same interpretation has been put upon these words in the present Bankrupt Act, by Judge Nelson, in *Merchants' National Bank* v. *Truax*, 1 N. B. R., 545, and *in re* Black and Secor, 1 N. B. R., 353.

Heddens & McDiarmid came within the definition here given of an insolvent at the date of this transaction. They were not only, not able to pay their debts in the ordinary course of business, but they owed debts two or three times greater in amount than the value of all the property they possessed.

The bankrupts were not able to pay their debts in the ordinary course of business, as merchants in trade usually do. Suits had been brought on their mercantile paper, long overdue, and they had no means to pay their debts or avert the consequences of a judgment, which would have resulted in an immediate stoppage of their business by a levy on their stock of goods, except by borrowing, a process which, while it might have furnished a momentary relief, would not have extricated them

from their financial embarrassments, and ultimate inevitable bankruptcy.

Campbell & Strong knew these facts; indeed, it was the knowledge of these facts that prompted them to seek the security their attorneys obtained for them. To know these facts was to know the bankrupts were insolvent, and to confess these facts, and at the same time deny knowledge of the bankrupts' insolvency, is simply a denial of the law applicable to the case.

There is another view to be taken of this case, which is equally conclusive against the pretensions of Campbell & Strong.

The rule is well established that a conveyance of the whole of a trader's property, or of the whole with a colorable exception made to a creditor, as a security for a pre-existing debt, is fraudulent and void, not only because he thereby deprives himself of the power of carrying on his trade, and withdraws his effects from the reach of his other creditors, but because such a conveyance must either be fraudulent, kept secret, or produce an immediate absolute bankruptcy. (Deacon on Bankruptcy, 68; Thelford on Bankruptcy, 140, and the English cases there cited; *ex parte* Brennan, Crabbe's R., 456; *in re* Langley, 1 B. R., 155; *Morse* v. *Godfrey*, 3 Story, 364; *Everett* v. *Stone*, 3 Story, 346; *Pecham* v. *Burrows*, 3 Story, 544.)

Here the bankrupts, Heddens & McDiarmid, did convey to one of their creditors the whole of their property to secure a pre-existing debt. They must be presumed to have known the natural consequences of their own acts, and so with Campbell & Strong. They knew of the embarrassments of Heddens & McDiarmid, and they or their agents might have known of their utter insolvency if they had put themselves on inquiry, as they should have done. They could not but have known that this mortgage did give them a preference, which was a fraud upon the Bankrupt Act. That was the necessary and inevitable consequence of the act, and they must, in law, be taken to have intended it. The intent to prefer may be inferred from the fact of preference. (*Beals* v. *Gray*, 13 Gray, 18.)

But this fact is not left to an inference of law. In their let-

ter to their attorneys, Campbell & Strong say: "They (Heddens & McDiarmid) desire to *first* secure us, *before* this claim from Cincinnati is put in judgment against them."

Here is the deliberate declaration of Campbell & Strong themselves, that the purpose of this mortgage was to secure them in preference to the Cincinnati creditors. But it is said the mortgage was made to secure future advances, as well as a pre-existing debt.

In answer to this suggestion, it is enough to say that the primary object of the mortgage was to secure an old debt; that there was no absolute agreement for advances, at all events, but only in the event that the mortgaged property would yield sufficient to pay such advances after first paying the old indebtedness; that no advances were, in fact, made, and that if the full sum mentioned had been advanced, it would not have enabled the bankrupts to discharge their debts, or continue their business, but would still have left some six thousand dollars of debts wholly unprovided for.

This is a much stronger case than that of *Pecham* v. *Burrows*, 3 Story, 544, where Justice Story uses this language: "So that, stripped of its artificial form, we have an indebtedness, to the full extent of all their means, to say the least of it, with a possibility of escaping from immediate insolvency and stoppage of their business, only by future credits, to be given to them by the defendant at his pleasure, and those credits avowedly to be given upon the basis of a direct preference over all the other creditors in case of that very insolvency and stoppage of business.

"It is difficult for me to perceive a more clear case for the application of the Act of Congress to conveyances made in contemplation of bankruptcy, etc.

"It does not rebut the intent to prefer, to show that the debtor has also another motive to the proceeding, namely, an expectation of future benefit to himself, by means of future loans of money, and being enabled thereby to continue his business." *Denny* v. *Dana*, 2 Cushing, 172.

Finally, this conveyance is, *prima facie*, fraudulent and void,

because it was not made in the usual and ordinary course of business of the debtors. In determining whether a given transaction is made in the ordinary and usual course of business of a party, the question is not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation. And if it is a departure from his usual and ordinary course of business, the statute intends that the party taking the conveyance from him shall be put upon inquiry. *Nary* v. *Merrill*, 8 Allen, 451; *Tuttle* v. *Truax*, 1 N. B. R., 601.

Independent of this express provision of the Bankrupt Act, the general rule of law in this class of cases is, that the transfer or delivery of property will be considered fraudulent, when it is not delivered in the usual course of trade, or of the accustomed dealings between the parties. 1 Deacon's Bank., 609, and cases there cited.

There is no proof tending in the slightest degree to rebut this *prima facie* case in favor of the plaintiffs. An invoice of the goods, or a single inquiry of Kingsbury, the clerk, would have disclosed all the facts in reference to the bankrupts' property, as they have been disclosed in the evidence on the trial of this cause; and Campbell & Strong cannot escape responsibility by pleading ignorance of facts, the knowledge of which they might have easily acquired by putting themselves upon such inquiry as the law requires of parties in such cases. *Pecham* v. *Burrows*, *supra*.

But it is said this conveyance by the bankrupts was the result of the pressure of Campbell & Strong, and cannot, therefore, be said to have been a voluntary preference on the part of the bankrupts, and that none but voluntary preferences on the part of a bankrupt are fraudulent under the Bankrupt Act.

This doctrine of pressure has no application under the present Bankrupt Act. If a trader is insolvent, and he knows that fact, and one of his creditors knowing that fact "presses" him for payment, and such payment is made, the transaction is

clearly a fraud upon the Bankrupt Act and the other creditors of the debtor.

The trader, knowing himself insolvent and unable to pay all his debts, must know that mortgaging his whole property to one creditor, or paying one creditor in full, will operate to give that creditor a preference over his other creditors, and the law holds every one to intend the necessary result of his act. And it is no answer to such action on the part of a trader to say his creditor "pressed" him, and threatened to sue or attach. The duty of the trader in such case is very plain under our present Bankrupt Act. *He should file his petition in bankruptcy, to the end that his assets might be distributed equally among all his creditors.*

Again, it is a fundamental principle of law that no man shall take advantage of his own wrong. A creditor who, knowing his debtor to be insolvent and unable to pay all his debts, resorts to pressure to compel such insolvent debtor to secure or pay his debt in full, perpetrates a deliberate fraud upon the Bankrupt Act and the other creditors of the debtor, because it is one of the chief objects of that act to secure an equal distribution of insolvents' estates among all their creditors, and to utterly extirpate the right of preference that existed at common law.

The law would fail of its chief object and purpose if this doctrine of pressure is to be recognized. If the doctrine could be supported under the present act, it would not avail Campbell & Strong in this case, because it certainly could not be held to extend to giving the bankrupts an election to prefer one of half a dozen creditors, all of whom were pressing them with equal vigor. Here the Cincinnati creditors had pressed for payment and been refused, and had resorted to the law to coerce payment of their debts. The assignees of Walton had done the same, and this pressure was prior to that of Campbell & Strong, and was subsisting at the time they obtained their mortgage.*

* Since this opinion was delivered, this question of the effect of pressure on the part of creditors has been passed upon by other District Judges, and

Is the defendant Knapp, who purchased the goods in question from Campbell & Strong, a *bona fide* purchaser, for a valuable consideration, without notice?

Knapp knew at the time he purchased that the bankrupts had failed in business and stopped payment, and that the title of Campbell & Strong, and Barnes & Bro., to the goods in question was derived from the mortgages executed to them by the bankrupts, and that the bankrupts had no other property, and that these goods were not sufficient to pay their debts. These facts were sufficient to put Knapp upon inquiry, and he was bound to inquire into, and ascertain the true nature of the transaction between the bankrupts and Campbell & Strong. The slightest inquiry would have disclosed facts showing that Campbell & Strong's title was defective.

Knowing facts sufficient to put a man of ordinary care and prudence upon inquiry, and having failed to make inquiry, or take any steps to acquire information of the facts for his protection, he is now estopped from claiming that he is a *bona fide* purchaser without notice.

He is not a purchaser for value in the sense of the rule upon this subject. He paid no money for the goods; he executed his notes for the whole amount; has paid no part of the notes. The notes are still in the hands of the payees, Campbell & Strong, and Barnes & Bro., and are all overdue, and have lost the incidents of negotiability.

Protection is not given by the rules of law to a party in such a predicament. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities. *Morse* v. *Godfrey*, 3 Story, 389; Willard's Eq. Jur., 256; 2 Leading Cases in Equity, 116.

All that has been said with reference to the invalidity of the transfer to Campbell & Strong, applies with redoubled force to the mortgage made to Barnes & Bro.

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the ruling has been uniform that it constitutes no defense. *Foster, assignee,* v. *Hackley & Sons*, 2 N. B. R., 406; *Wilson, assignee,* v. *Brinkman et al.*, 2 N. B. R., 468; *Graham, assignee,* v. *Stark et al.*, 3 N. B. R., 357.

Their mortgage was subsequent to Campbell & Strong's, and they took it with full knowledge of the insolvency of Heddens & McDiarmid, and with a view to obtain a preference.

I think the goods were worth what the defendant agreed to pay Campbell & Strong, and Barnes & Bro. for them.

Let judgment be entered for three thousand four hundred dollars, and eight months' interest thereon, at six per cent.

The judgment in this case was affirmed at the April term, 1870, of the United States Circuit Court, by Miller, J.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

An execution in the hands of the sheriff being, by the laws of the State of Illinois, a lien upon all the personal property of the defendant, within the county, for the space of ninety days, if a petition in bankruptcy is filed during that time, the lien is transferred to the property in the hands of the assignee, and the execution must be paid in full out of the proceeds.

The fact that the judgment was entered upon a warrant of attorney does not invalidate the lien, if the creditor did not know of the failing circumstances of the debtor, and if it was not entered up "in contemplation of bankruptcy or insolvency."

A direction by the execution creditor to the sheriff "to hold the execution, but not to levy for a few days, or until further orders," does not impair the lien.

In re Weeks.

On the 25th of October, 1869, Eldridge recovered a judgment in the Superior Court of Chicago, against Charles R. Weeks, upon which an execution was on the same day duly issued and delivered to the sheriff of Cook county. The judgment was entered upon a warrant of attorney, but Eldridge did not know that Weeks was in failing circumstances, nor was there any question that the warrant was not given or judgment entered "in contemplation of bankruptcy or insolvency." Weeks was, at the time, the owner of, and in the possession of a stock of goods.

On the 11th of November following, Weeks filed his petition in bankruptcy, was duly adjudged a bankrupt, and the stock of

goods passed into the hands of the assignee, and was sold by him. The sheriff had made a demand of Weeks upon his execution, and upon his promise to pay, Eldridge had directed the sheriff "to hold the execution, and not to levy for a few days, or until further orders." No levy was ever made.

At the first meeting of creditors, December 10, Eldridge proved his debt as a secured claim, according to Form No. 21, setting up his judgment and execution, and the lien thereby acquired under the law of Illinois.

Eldridge then filed a petition in the bankrupt proceedings, setting up the above facts, claiming a lien under his execution, and asking to be paid in full out of the funds in the hands of the assignee.

Robert E. Jenkins, counsel for Eldridge, presented the following points and authorities:

By the *judgment* and *execution*, and *placing the execution in the sheriff's hands*, Eldridge *acquired a lien* on all the personal property of the bankrupt in the county, from the time it came to the hands of the sheriff (25th October, 1869), for the space of ninety days. Gross' Statutes of Ill., p. 375, Section 8. *Marshall* v. *Cunningham*, 13 Ill. Rep., 20; *Garner* v. *Willis*, Breese, Ill. Rep., 368; *Rogers* v. *Dickey*, 1 Gilm. Ill. Rep., 643; *Leach* v. *Pine*, 41 Ill. Rep., 65.

The failure to levy did not impair the lien. The property passed into the court in bankruptcy, subject to it, and Eldridge certainly has the right to pursue his lien in bankruptcy. The Bankrupt Act gives the Court in Bankruptcy jurisdiction to ascertain and liquidate *all* liens. See 1st Section Bankrupt Act of March 1, 1867.

By proving up his debt within the life of his writ, *his lien was transferred* to the funds in the hands of the assignee.

This execution is a *final process*. The lien was not secured with the view to obtain a preference, but, on the contrary, was taken in good faith. See opinion of Drummond, J., *in re* Joslyn *et al.*, 3 N. B. R., 473.

J. E. Lockwood, assignee and attorney *pro se*, presented the following:

The execution returned "not levied," is *functus officio*, and is no lien after such return. *Garner* v. *Willis*, Breese, Ill. Rep., 290; 3 Scam., 551; 9 Cowen, 728; 4 Sand, 700.

If a judgment creditor enter into an agreement to stay his execution, it becomes dormant as to other parties, and he loses any lien made by a levy under it. 26 Ill. Rep, 221; 2 Johns., 283; 17 Johns., 438; 17 Johns., 274; 21 Wend., 222.

R. E. Jenkins, counsel for Eldridge, in reply, presented the following, upon the question raised by the assignee that Eldridge lost his lien by his direction to the sheriff "to hold the execution, but not to levy for a few days, or until further orders."

Notwithstanding this direction, this execution would still be a good lien, even as against other execution creditors. *Hurston* v. *Sutton*, 3 Harrington, 37; *Caldwell* v. *Fifield*, 4 Zabr., 150; *Sterling* v. *Vancher*, 7 Halstead, 285; *James* v. *Burnett*, Spencer, 635; *Cumberland Bank* v. *Hann*, 4 Harr., 166; *Doty* v. *Turner*, 8 Johns. Rep., 20; Smith's Appeal, 2 Burr., 331; *Leach* v. *Williams*, 8 Ala., 759.

But this is not a question as between execution creditors. Weeks could not avoid this execution were he not in bankruptcy. Neither can his assignee, for *liens good against the bankrupt are good* against his assignees voluntarily, or others with notice, and "*against assignees in bankruptcy who are treated as volunteers.*" *Fletcher* v. *Morey*, 2 Story, 555; *Mitchell* v. *Winsboro*, 2 Story, 631; *Tolbert* v. *Melton*, 9 S. & M., 9; and cited 10th Iowa Rep., 360, upon the point that this execution was good between the parties, deeming the question too well settled to require further authorities.

Blodgett, J.—I think the facts in this case clearly show a valid judgment in favor of Eldridge, and against the bankrupt, and a valid lien under the execution at the time of the commencement of the proceedings in bankruptcy.

There is no evidence of fraud or preference in the obtaining of the judgment and execution, and the delay in making the levy did not defeat the lien which the Statute of Illinois gives

against the goods of a defendant in execution from the time the writ comes into the hands of the sheriff.

The execution, then, being a valid lien on the goods of the bankrupt, must be first paid in full out of the proceeds of the goods in the hands of the assignee, as this court, in disposing of the proceeds, must respect, in the order of their priority, all liens and incumbrances on the assets from which such proceeds were derived.

It is not the purpose of the Bankrupt Act to defeat valid liens or even advantages which creditors have obtained by their superior vigilance or sagacity, unless there is evidence of fraud or some direct contravention of the positive prohibitions of the law.

Evidently this execution was a valid lien on the goods, as against Weeks, and his assignee, under the facts in this case, is in no better position than the bankrupt himself would have been.

The order will therefore be that the execution be paid in full by the assignee.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A Register has power to postpone the proof of a claim where there are doubts as to its validity, in view of the receipt of a preference contrary to the provisions of the United States Bankrupt Act of 1867.

The taking of property on attachment or execution is receiving a preference; the mere obtaining of judgment, however, is not.

It is not necessary for creditors who have recovered judgments after the adjudication of their debtor, to vacate their judgments before they can prove the claims on which such judgments were recovered, provided the claims were otherwise valid and properly provable.

In re STEVENS.

AT a Court of Bankruptcy held at the Court-House in Catskill in said district, on the 24th day of January, 1871, before Mr. Theodore B. Gates, Register of said court in bankruptcy, this being the day to which the first meeting of creditors in the above entitled matter had been duly adjourned, I sat at the place above designated for the purpose of holding such first meeting.

G. A. Seixas, Esquire, appeared for the petitioning and sundry other creditors, while Messrs. A. C. Griswold, S. A. Givens, D. K. Olney, T. Edwards, and — Hill represented the residue of the creditors who appeared.

The petition was filed in this case on the 27th of September, 1870, and the adjudication thereon was 10th of October following. The question being on the right of creditors thus represented, and whose depositions for the proof of their several claims were produced and filed with me, to vote for assignee, Mr. Seixas moved to "suspend" sundry proofs until the appointment of assignee, upon the ground that the creditors holding such claims had severally sought to obtain and had obtained a preference over other creditors, in violation of the provisions of the Bankrupt Law, and in support of the motion read two affidavits. The affidavits allege in substance that Throckmorton, Diggs & Co., Potter & Williams, Thomas L. Smith & Co., Olney & King, Peter Rowe, Cornell, Horton & Co., and Addison C. Griswold, being creditors of the said bankrupt, and having reason to believe he was insolvent and not able to pay his debts as they matured, did, between the 17th and 24th September, 1870, sue out attachments against said bankrupt and attach his property; and that said creditors did severally enter up judgment against said bankrupt upon such proceedings after the filing of the petition for adjudication in bankruptcy.

The affidavits also further show that George A. Birch and others recovered a judgment against the bankrupt on the 11th day of October, 1870, on which it does not appear that any attachment or final process issued. The affidavits also further show that Daniel W. Jennings recovered a judgment against the bankrupt on the 20th day of September, 1870, and that Roman Stevens recovered a judgment against the bankrupt on the 30th day of September, 1870, and that executions were subsequently issued upon these judgments and levied upon the goods of the bankrupt. These several claims had been already proven, and the depositions were before me. It was therefore impossible to literally "suspend" or postpone proof of the claim as provided in the 23d Section of the Bankrupt Law, and

Rule 6 of this court. Nevertheless, if these several claims are not the proper subjects of proof, under existing circumstances, then they should not be represented in the choice of assignee. I therefore adjourned the meeting until the 14th day of February, 1871, in order to submit the question to his Honor, Judge Blatchford, whether the affidavits (with the foregoing statement) show a case that would justify and require the Register to exclude these creditors from participation in the choice of assignee. If they do show such a case, then would the Register be justified, upon a proper application by these creditors, to further adjourn the meeting to enable them to vacate their several judgments and place themselves (if they can) in a position to prove their claims, upon the principle laid down by your Honor *in re* Brown, 3 N. B. R., 584?

I anticipate this latter question in order to save time and expense, if such a contingency arise.

THEODORE B. GATES,
Register.

BLATCHFORD, J.—By Section 18 it is provided that no person who has received any preference contrary to the provisions of the act shall vote for an assignee. The power given to the Judge by Section 23, and to the Register by Rule 6, of this court, to postpone proof of a claim until an assignee is chosen, in a case where there are doubts as to the validity of the claim, or as to the right of the creditor to prove it, and an opinion entertained that such validity or right ought to be investigated by the assignee, includes the power to so postpone, where the doubts are whether the claim is valid in view of the receipt of a preference contrary to the provisions of the act by the creditor. The provisions which define when a debt cannot be proved because of the acceptance of a preference by the creditor are found in Sections 23, 39, and 35. The Register ought to exclude from voting for an assignee all persons who appear to him, on proof, to be thus inhibited from proving their debts. He may do so by postponing the proof of such claims until after the election or appointment of an assignee; and he may

do so although the depositions for the proof of such claims have been produced to and filed with him. Whether under these rules of law the affidavits presented to the Register in this case are sufficient in point of fact to justify and require him to exclude any or all of the creditors named from voting for an assignee, can be answered only by saying that those ought to be excluded who appear to have accepted or received a preference before the petition in bankruptcy was filed, and none others. Taking property on attachment or execution is receiving a preference. Merely obtaining a judgment is not.

As to the second question, I do not regard it as necessary under the decision *in re* Brown, 3 N. B. R., 584, for the creditors who recovered judgments after the adjudication to vacate their judgments before they can prove the claims on which the judgments were recovered, provided such claims are otherwise properly provable under the views above stated.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The election of a near relative of the bankrupt as assignee is not proper. In such case, the appointment by the Register of a regular assignee (according to the rules of the district) will be confirmed.

In re WILLIAM G. ZINN, HERMAN D. ALDRICH, JR., JOHN H. BRADLEY, THOMAS DARLING, AND JOHN L. ALDRICH, *composing the firm of* ZINN, ALDRICH & Co.

THE above entitled matter is now pending before me, at chambers of this court, and is a voluntary proceeding under the Bankrupt Act. A warrant was issued to the U. S. Marshal as messenger, duly served and published, and returned in due form. The petitioners have been duly adjudged bankrupts upon their own petition as a firm and individually. The whole number of creditors named in the warrant, including those of the firm and the individual creditors, are about sixty (60). That on or previous to the day of the first meeting of creditors, eighteen claims had been proven.

At the first meeting of creditors eight creditors signed a paper in the words and figures following, to wit, and to which John H. Bradley was sworn. (Form No. 63, which is herewith returned.)

It is represented to me by creditors who have proved their claims, that John H. Wyman, of the city of New York, Samuel Wyman, Jr., H. D. Aldrich, and the bankrupts, or some of the bankrupts, are related to each other, and that the bankrupt, Herman D. Aldrich, Jr., is a nephew of Herman D. Aldrich, who is one of the creditors of the estate of said bankrupts, making a claim by Samuel Wyman, Jr., his attorney, in the sum of one hundred and eighty-eight thousand eight hundred and sixty-six dollars and eighty-eight cents. It is also represented to me that said Herman D. Aldrich is now insane, and is in the Insane Asylum. Said Samuel Wyman, Jr., exhibited but did not place on file a power of attorney, but not a power of attorney in these proceedings in bankruptcy.

It appears that George C. T. Seaman, one of the committee of creditors, is a resident of the city of Elizabeth, in the State of New Jersey, and not a resident of the Southern District of New York; and the decisions in the cases *in re* Harris, 2 N. B. R., 105; Anon., 2 N. B. R., 68, would render him ineligible. It has been uniformly held by the courts, that they will not affirm the appointment or election of an assignee who is a relative of the bankrupt. It is also held that it is an objection to the trustee that he is a relative of the bankrupt. *In re* Stilwell, 2 N. B. R., 526.

As such a large amount of the debts proved are owned by H. D. Aldrich, who is said to be insane, and by Samuel Wyman, Jr., attorney for H. D. Aldrich, and by George C. T. Seaman, and the claims of many of the other creditors being small, the larger claims so overbalance them that they had but little or no voice in the proceedings. Their rights must therefore be more carefully protected by the court than if they appeared by counsel. Mr. John H. Wyman and George C. T. Seaman are both men of good character and standing in the community.

After examining the authorities applicable to this case, and particularly the decision of Judge Hall, *in re* Stilwell, 2 N. B. R., 526, I cannot legally sign the certificate attached to Form No. 63 without the direction of the court. I hold, as a matter of law, that the proceedings had by the creditors on the return day of the warrant were void, and not a compliance with the rule and practice of this court. That an assignee was chosen or voted for, and that John H. Wyman is ineligible as trustee on account of relationship, and that George C. T. Seaman is ineligible as one of the committee on account of his not being a resident of the Southern District of New York; 2 N. B. R., 526; that under the Bankrupt Act, and by the rules of this court, to appoint John Sedgwick assignee, in order that, should your Honor concur in the opinion of Judge Hall, 2 N. B. R., 526, the case may proceed regularly. Should I not do so, an *alias* warrant would have to issue delaying the proceedings unnecessarily. I also send a blank form, No. 63, in order, should your Honor decide adversely to the decision of Judge Hall, I can sign the certificate thereto *nunc pro tunc*. In doing so, the court gets entire possession of the case, and can dispose of it on the hearing. Mr. Cummings, counsel for some of the creditors, desires to be heard orally by the court, and also requests the certificate to Form No. 63. Augustus C. Fransioli, attorney for creditors, also desires to be heard orally by the court.

The proof of the claim of H. D. Aldrich, by Samuel Wyman, Jr., attorney, in the sum of one hundred and eighty-eight thousand eight hundred and sixty-six dollars and eighty-eight cents, is hereunto annexed, and the papers in the case not on file in the clerk's office submitted, and also the papers and protest of the creditors represented by F. C. Fransioli, attorney. Should any question arise as to the relationship of the parties, a reference can be had to ascertain the facts. It is exceedingly desirable that the court should lay down a rule as to relatives of bankrupts, etc., serving as trustees on committees, in order that it may be followed in all cases. That the application of creditors for the examination of the bankrupts and witnesses is hereto annexed, and the Register desires directions

from the court as to the course he should pursue in regard to the same.

JOHN FITCH, *Register.*

BLATCHFORD, J.—Under Section 43, the bankrupts and such creditors as may desire to be heard will be heard, on notice, as to whether the resolution appended to the certificate of the Register was duly passed, and whether the interests of the creditors will be promoted thereby, and whether it ought to be confirmed by the court. Meantime the appointment of Mr. Sedgwick as assignee is approved, and he will take such steps as shall seem proper in view of the facts set forth in the certificate of the Register and in the papers annexed to it.

UNITED STATES DISTRICT COURT—MARYLAND.

There is no concealment where a debtor makes a *bona fide* conversion of his property, and shows good faith in respect to the care of the money received therefrom.

A debtor will not be adjudicated a bankrupt simply because, after selling his property for the purpose of going into a new business enterprise, he does not put the proceeds into a tangible shape to prevent the same being seized on process issued out of a State court. Petition dismissed.

FOX *v.* ECKSTEIN.

THE allegation was that defendant, on January 4, had concealed a portion of his property, viz.: the sum of two thousand dollars, with intent to prevent its being taken on legal process, which he knew was about to issue at the suit of one or more of his creditors.

The defendant excepted to this allegation on the ground that it was too general; that it did not state that any legal process was in existence, that there was no legal process which could reach money in possession, and that the act did not embrace the concealment of property which it was impossible to reach by any legal process. Objections overruled.

It appeared in evidence that the petitioner, defendant, and

seven others, had given their joint and several promissory notes in the sums of two thousand five hundred dollars, and one thousand five hundred dollars, for moneys borrowed in behalf of the Scheutzen Association; that the association had made a real estate mortgage to Fox and others to secure them in this sum of four thousand dollars; that after maturity, Fox had paid the one thousand five hundred dollars in cash, and given his individual note (not yet due), with collaterals, in payment of the two thousand five hundred dollar note, and his demand against the defendant was for contribution of one-ninth part of the four thousand dollars. The defendant objected, that petitioner had not a provable claim of sufficient amount, because: First, he did not offer to surrender the security which enured to his benefit on payment of the notes, nor show that there was an overplus of two hundred and fifty dollars; Second, the petitioner not having paid the two thousand five hundred dollar note in cash, but having only given for it another obligation, he could not demand from defendant his proportion of that amount; that a co-obligor has no right of contribution against his *co-promisor*, or *co-security*, unless he has actually paid the money, and therefore the petitioner's claim was not large enough to support an adjudication.

The court, Giles, J., held; that the security being upon the property of a third party, and not upon the debtor's, the case was not within the act; and that the petitioner *having satisfied the holder of the note*, it was immaterial how he had done so, and he had a demand for contribution, whether he had, in point of fact, paid it or not.

Touching the allegation, the evidence was, that seven months before the defendant had sold his real estate for two thousand dollars to his son, who gave his note, which was paid at ninety days; that the notes in question, and one other of the same character, were outstanding at the time, and had been for two or three years, and that defendant's other property was about seven hundred dollars; that defendant had sold his said real estate for the purpose of investing the proceeds in a proper business enterprise in which he expected to enter; that on payment of

the two thousand dollars he handed it over to his wife, and that she had been in the habit of taking care of any large sums of money defendant had for twenty-five years; that she kept it about the house for several months, and had it on the said 4th January; that when the enterprise referred to was abandoned, defendant looked about for another investment, bought two lots in the county, built the foundations, and was in negotiation with a carpenter for the erection of several small houses when these proceedings commenced; that in December judgment had been had against defendant, and five other co-promisors by another party, on the third note referred to (of four thousand dollars); that defendant claimed to have a right of action against the petitioner for damages amounting to about his proportion of the two notes taken up by said petitioner; that on January 4th petitioner's attorney called on defendant and told him that petitioner had paid these two notes, and he had called to collect his proportion; that defendant replied that he (petitioner) was the one who *ought* to pay them, and that when petitioner settled his claim for damages referred to, he (defendant) was ready to pay him the difference; that the attorney then asked him what he had done with the two thousand dollars; to which defendant replied that he had it and intended to keep it.

The court held that there was no concealment shown; that the conversion of his property had been shown to be *bona fide;* that no *act* had been shown further than to preserve custody of the proceeds; that the proceeds he had a right to preserve in money or not, as he pleased; that the evidence showed good faith on the part of defendant in respect to the care of the money; and that the proposition of the petitioner was substantially that the defendant ought to be adjudicated bankrupt, simply because he had not put his two thousand dollars again into tangible property that could be seized on a *fieri facias.* Petition dismissed.

Marshall & Fisher, Ross & Urner, for petitioner.

John and *Albert Ritchie,* for defendant.

UNITED STATES DISTRICT COURT—MAINE.

Where an assignment by a debtor of all his property to an assignee for the benefit of his creditors under a State law, is avoided by one of his creditors by proceedings under the Bankrupt Law:

1. It was held that the assignee under the State law is liable to the assignee subsequently appointed under proceedings in bankruptcy for all the property and proceeds thereof in his hands, and has no right to deduct any compensation for his own services in executing the trust as assignee under such State law.
2. Also, that the proceedings, had under the State law, were in fraud of the Bankrupt Act, and the Court in Bankruptcy cannot allow a party the expenses incurred by him in his attempt to defeat the provisions and operations of the Bankrupt Law.

In re STUBBS.

I, CHARLES HAMLIN, one of the Registers of said Court in Bankruptcy, do hereby certify that in course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the opposing parties, to wit.: Mr. Sweden S. Patten, who appeared for himself, and Charles P. Stetson, Esq., assignee of said Stubbs in bankruptcy.

September 30th, 1870, said bankrupt made an assignment of all his property to Sweden S. Patten, of Bangor, under the provisions of Chap. 70 of Revised Statutes of the State of Maine, and said Patten took possession of same, and sold a portion of said property, to wit: goods in store; and collected certain accounts, in all amounting to one hundred and ninety-two dollars and forty-four cents, which amount said Patten now has in his hands. Afterwards, to wit: on the 11th day of October, 1870, on petition of his creditors, said Stubbs was decreed a bankrupt under the law of the United States, and by order of the judge of the United States District Court, said Patten was enjoined from making further sale of said goods, etc. Said Patten afterwards delivered all property of said bankrupt's estate in his possession to Charles P. Stetson, Esq., assignee in bankruptcy of the estate of said Stubbs, and said Stetson, assignee as aforesaid, this day demanded of said Patten said one hundred and ninety-two dollars and forty-four cents received by said Patten from sale of goods, and collections from

accounts, after he was appointed assignee under the laws of said State, but said Patten refuses to pay said money to said Stetson, and claims that there should be set off and deducted by him certain charges for expenses incurred by him as assignee under said State Laws as aforesaid, and for his services, an account of which charges is hereto annexed, viz.:

1870. Estate of Asa N. Stubbs to S. S. Patten, Dr.

Oct. 4,	To cash paid		Insurance on Stock,	$13 50
" 8,	"	"	Lizzie Pond,	5 00
" 12,	"	"	Bangor Democrat for Assignee's Notice,	2 00
" 12,	"	"	Cartman,	25
" 18,	"	"	Augusta Stubbs for services in store,	2 50
" 18,	"	"	Asa N. Stubbs, 14 days services,	42 00
" 13,	"	"	A. G. Wakefield, Att'y, for advice, etc., in case in Probate Court,	5 00
" 13,	"	"	services of myself in taking and extending stock and other services in sale of goods, and in Probate Court,	50 00
For expenses in Probate Court charged in Probate Court by Judge Godfrey, according to Chap. 70, R. S. of Maine,				50 00
				$170 25

The question presented for decision is, whether and what, if any, of above charges can be allowed to said Patten? No question is made as to the reasonableness of any of the charges except the last, for expenses in Probate Court.

I was of the opinion that said Patten should pay over to said Stetson, as assignee in bankruptcy, the amounts collected by him, without any deduction claimed by him in his said account.

And the said parties requested that the same should certified to the judge, for his opinion thereon.

Chas. Hamlin, *Register.*

Fox, J.—The proceedings had, under the State law were in fraud of the Bankrupt Act, and the Court in Bankruptcy cannot allow a party the expenses incurred by him in his attempt to defeat the provisions and operation of the Bankrupt Law.

The decision of the Register is approved.*

* Vide *Bartlett* v. *Bramhall*, 3 Gray, 257.

UNITED STATES DISTRICT COURT—W. D. WISCONSIN.

1. *Held*, that the rule that prefers partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it.
2. That the partners in this case did waive it by giving their notes and mortgage upon the partnership property, to secure them, notwithstanding that the debts for which the notes were given were individual debts.
3. That the sale in question was made out of the "ordinary course of business," and as the purchaser had good reason to believe that the bankrupts were insolvent at the time, it is void under the Bankrupt Act.
4. That the purchaser, on the title failing which he supposed he got, would be restored to his rights as mortgagee as they existed when he attempted to purchase, and he would lose nothing more than his title under the purchase.
5. *Held*, that the mortgage is void as to the after acquired property, but valid as to the fixtures and such portions of the stock as remains unsold and can be identified.
6. That where a mortgage was made on a whole stock of goods, with the understanding that the mortgagors would sell the stock then on hand, and put in more from time to time as they might be able or wish to, *held*, that the mortgage as against creditors was not valid.
7. That in Wisconsin a clause in the mortgage giving the mortgagors the right to sell the stock and use the money as they might choose, would be to render the mortgage void as to the whole stock.
8. When these facts appear on the face of the mortgage, it should be held void by the court; but when it appears by evidence *aliunde*, the court should instruct the jury that such understanding would avoid the mortgage.
9. That under Sections 1 and 20 of the Bankrupt Act the court has the right through its officers, to take possession of all mortgaged property free of the lien of the mortgage, without first satisfying that lien, but in such case the lien is transferred to the fund in court.
10. That it is a matter of discretion with the court to sell subject to, or free of the liens or incumbrances.

In re KAHLEY *et al.*

HOPKINS, J.—Proceedings were commenced in this matter on the 20th of October, 1870, and a warrant issued to take possession of the bankrupts' property. The marshal, on the 21st, seized, by virtue of his warrant, a stock of goods, consisting of toys, candies, and cigars, and the fixtures in the store or salesroom used for the business. The bankrupts had been for about a year previous thereto, engaged in selling and dealing in that class of goods. In February, 1870, the bankrupts gave to one Daniel G. Ilgen their notes, one for four hundred and seventy-five dollars, which was for the balance of the purchase price of

the interest of said Ilgen in said business sold to Kahley, and the other for five hundred dollars, being for balance due to Ilgen from Manning, for money put into the business for Manning; and to secure the notes they gave a chattel mortgage upon the stock of goods on hand, and such as might afterwards be purchased and put into the store, and also upon the fixtures. One note became due October 12, 1870, and was not paid. Ilgen then purchased the whole of the stock and fixtures at six hundred dollars over and above his mortgage, and gave them two notes of three hundred dollars each, one payable to each, and gave up his notes against them secured by his mortgage, and went into possession as such purchaser. At this time Ilgen knew that their debts greatly exceeded their assets.

Ilgen now, on these facts, applies to this court for an order for the property. A great many questions were raised and discussed by the respective counsel on the argument. Those that I regard as decisive of the case, I will proceed to dispose of. The creditors insist that the mortgage is void as against the partnership creditors, because the notes or the debts which it was in fact given to secure, were individual debts of the respective partners, and not properly a partnership demand.

I think the mortgage is good as against the partnership property. *Kinly* v. *Schoomaker*, 3 Barb. Chy. R., 46.

The rule that prefers partnership property to the payment of partnership debts, is for the benefit of the partners, and they may waive it, which I think they did in this case, by giving their notes and mortgage upon the partnership property to secure them, notwithstanding the debts for which the notes were given were the individual debts of the bankrupts.

The sale of the property by the bankrupts to Ilgen, on the 13th or 14th of October, was not made in the usual and ordinary course of business of the bankrupts, and is, therefore, *prima facie* evidence of fraud, under Section 35 of the Bankrupt Act. It may also have been fraudulent by the common law; and the fact that a jury so found, and the ready acquiesence of both parties in such finding, and their attempting to change their condition immediately thereafter, is very strong

evidence that they understood that it was; and if I were to decide the case upon the evidence, as to the *bona fides* of that sale, I think I should have to hold it fraudulent and void as to the creditors, without reference to the Bankrupt Act. But as I consider it a sale "out of the ordinary course of business," and as Ilgen must have had good reason to believe that they were insolvent at the time, I think it is clearly void under the Bankrupt Act.

But notwithstanding the sale was void, and Ilgen not entitled to the property under it as against the creditors, still I think he has the right to assert his lien by virtue of his mortgage so far as that is valid. I do not think his purchase, which the creditors have a right to avoid, impairs his rights under his mortgage. But on the title failing that he supposed he got by the purchase, I think he would be restored to his rights as mortgagee, as they existed when he attempted to purchase. His title under the purchase he would lose, but nothing more.

The creditors would not be placed, by reason of the attempted purchase, in any better condition than they were before, nor he in any worse. It is like a case where usury is interposed to a note given in renewal of a valid, existing debt. If the new security is declared void for usury, the plaintiff's right to recover on the original indebtedness is revived. *Porter* v. *Eastman*, 14 Wis., 39; 16 *Ib.*, 319, and cases there cited.

I now come to the consideration of the more important question—what property is bound by the Ilgen mortgage? It is certainly invalid as to the after acquired property. *Chynoweth* v. *Tenney*, 10 Wis., 397; *Sigle* v. *Phelps*, 20 Wis., 398; 19 N. Y., *infra.*

But it is claimed to be valid as to the fixtures, and as to such portion of the stock as remains, and can be identified as being on hand when it was given.

There is no doubt but that it may be in operation as to a part and binding as to the residue. Therefore, as to the fixtures which have not been changed I think it is good. But, as to such portions of the stock as may not have been sold, and

can be identified, I think, according to the weight of authority, it cannot be sustained.

The mortgage was upon a stock that was kept for sale, and unquestionably both parties expected that it would be sold. The mortgagors were engaged in selling that class of goods as a business. They bought them to sell, and intended and expected to sell them. So that I must presume that it was understood and expected by both parties that the mortgagors would sell the stock then on hand, and put in more from time to time, as they might be able, or wish to do, and as they in fact did do. And which view is strengthened and made almost conclusive by the clause in the mortgage relating to after acquired goods. That being the case, I think the mortgage of the whole stock that might be sold by the mortgagors is vitiated as to creditors.

The Supreme Court of Illinois in *Burnett* v. *Fergus et al.*, reported 3 *Chicago Legal News*, 29, have justly decided a mortgage under such circumstances to be void. In which decision I fully concur. If there had been a clause in the mortgage giving the mortgagors the right to sell the stock and use the money as they might choose, it would have rendered the mortgage void in law as to the whole stock. *Place* v. *Langworthy*, 13 Wis., 629; *Gardner* v. *McEvans*, 19 New York, 123; *Collins* v. *Meyer*, 16 Ohio, 547; *Jordan* v. *Turner*, 3 Blackford, 309; *Edgell* v. *Hart*, 5 Seldon, 213.

To sustain a mortgage accompanied by such an agreement, consent, or understanding, would allow a mortgagor to sell the mortgaged property as he saw fit, use the proceeds for his own benefit, exercise all the control, and enjoy all the advantages of an absolute owner in defiance of his creditors. A mortgage accompanied by such an agreement or consent is no protection to the mortgagee. Such an arrangement defeats its essential nature and quality as a mortgage, so that it cannot in a legal sense be called a security. It is nothing more than the expression of a confidence by the mortgagee in the mortgagor.

To permit a debtor to guard his property against his other creditors by such a mortgage, would enable him to hinder and

delay them as long as he and his confidential mortgagee might see fit. I am fully satisfied that a mortgage upon a stock of goods, which authorizes the mortgager to sell them and replace them with others, at such times and in such manner as he may determine, and use the proceeds generally as he saw fit, is void as to such goods as the power of sale relates to.

Then the question arises, how may it be proven?

If it is inserted in the mortgage, it is proven by the production of the mortgage, but if it is not, it may be proven by evidence *aliunde*. It is not necessary that it should be in writing, or in the mortgage. It may be proven by *parol*, or inferred from circumstances and the conduct of the parties. It must, of course, be established by legal and competent evidence, and when thus established it is fatal to the security. If it appeared upon the face of the mortgage it would be held void by the court, 13 Wis., *supra*. But if not there, and it appeared by evidence *aliunde*, it would be the duty of the court to instruct the jury that such a consent or understanding would avoid the mortgage.

And as I think the testimony shows, that it was understood between Ilgen and the mortgagors that they might continue to keep possession of, and to sell the stock of goods after the mortgage was given, and use the proceeds at their discretion in buying other stock, that the mortgage is void as to the whole stock, and only good as to the fixtures.

It appears that after Ilgen had been in possession a short time, and after his purchase had by a jury in a justice court been decided to be void as against creditors, that they attempted to trade back. But such re-transfer was after the commencement of these proceedings, and when the marshal entered it was not wholly completed. Ilgen did not then claim to own the goods, but asserted his lien as mortgagee.

I think the creditors may therefore either ratify the sale and collect of Ilgen the six hundred dollars he agreed to pay, or treat it as void and take the goods. The goods were taken by the marshal, and afterwards delivered to a provisional assignee appointed at the request of the counsel of Ilgen.

The counsel of Ilgen on this motion argues with a good deal of earnestness the point, that this court had no right to take possession of the mortgaged property after a default in payment, and sell it without first paying off the mortgage, particularly in this case, as he claimed the mortgagee was in possession, when these proceedings were commenced.

Under Sections 1 and 20 of the Bankrupt Act, I have no doubt but that this court has the right, through its officers, to take possession of, and sell mortgaged property free of the lien of the mortgage, without first satisfying the lien. *Houston* v. *The Bank of N. O.*, 6 How., 486; *Foster et al.* v *Ames*, 2 N. B. R., 455; *ex parte* Christy, 3 How., 308. In which case the lien is transferred to the fund in court. It is a matter of discretion with this court to sell subject to or free of the lien or incumbrance.

But this discretion should be exercised with due care and regard for the interest of the secured creditor as well as the general creditors. And if the property was of less value than the debt, or had no marketable value, and there was no question as to the validity of the lien, it should be delivered to the secured creditor instead of being sold. And in this case I should have ordered the fixtures delivered to Ilgen were it not that the creditors question the validity of his mortgage.

I understood the counsel of Ilgen to intimate that Ilgen would now take the property and pay the six hundred dollars, and I understood the counsel for the creditors to state that if I should hold the mortgage as valid on the fixtures that the creditors would prefer to accept the six hundred dollars instead of the goods. I shall therefore deny this motion of Ilgen for the property.

And I shall order that if he pay into the registry of the court six hundred dollars, and pay the fees and expenses of the provisional assignee within ten days, that the whole stock and fixtures be delivered to him. And shall order that Manning deposit in this court the note given him by Ilgen for three hundred dollars for his share of the stock.

I have charged Ilgen with the expenses of the provisional

assignee, as he was appointed at his request. And if Ilgen does not comply with the above terms, that then the assignee proceed to sell the goods and fixtures. That he sell the stock and fixtures separately and pay the proceeds into this court, stating the amount for which he sold each separately.

Conger & Sloan, of Janesville, for mortgagee, Ilgen.

Tenney, McClellan & Tenney, of Chicago, for creditors.

UNITED STATES DISTRICT COURT—E. D. PENNSYLVANIA.

A sale by the marshal as messenger, under a special order of the court, prior to the appointment of an assignee, is to be considered as in the nature of a sale made by a provisional assignee.

In a sale so made of the lease, good-will, and fixtures of a grocery store, only such things (or their accessories) as are actually or constructively fastened to the freehold, will pass to the purchaser of fixtures.

A purchaser of the fixtures at such a sale may make claim upon the funds in the hands of the assignee for the sale, by the messenger, of such articles as were properly included under the sale of the fixtures and afterwards resold as movables.

In re HITCHINGS.

AT an adjourned third general meeting of creditors, held in said matter, on the 18th day of October, A.D. 1870, before Joseph Mason, Register in Bankruptcy, a claim of C. C. Selden was presented for proceeds of sale of certain articles sold by the marshal as messenger, and which said claimant alleged had been previously sold to him as part of the lease, good-will and fixtures of a certain store formerly in the occupation of the bankrupt.

The principal testimony taken in relation to said claim was as follows:

Conner C. Selden, the claimant, being duly sworn, was examined by George S. Selden, Esq., his counsel, as follows:

I was the purchaser of the lease, good-will and fixtures at the marshal's sale of Mr. Hitching's property, which were the first things sold at the sale. I complied with the terms of sale, and paid fifty dollars cash at the time of sale, and the balance im-

mediately after the confirmation of the sale. After the sale of the lease, good-will and fixtures, the marshal proceeded to sell the groceries and the articles set forth in the annexed schedule (being six tea-caddies, for seven dollars and fifty cents; one desk, seventy-five cents; refrigerator, four dollars; platform scales, twelve dollars and fifty cents; stove, three dollars; show-case, four dollars and twenty-five cents; fire-proof safe, twelve dollars and fifty cents; meat scales, three dollars and seventy-five cents; marble slab, three dollars; two molasses cans, fifteen dollars; lot of measures and funnels, sixty-two cents; cheese cover, one dollar and twenty cents; two cider barrels, seven dollars and fifty cents; tin cans, fifty-five cents; awning, twenty-nine dollars; awning frame, thirty-six dollars; three coffee bins, ten dollars and fifty cents; one meat saw, two dollars; meat knife, steel, and cheese knife, two dollars and fifty cents; measures, three dollars; cigar case, one dollar and seventy cents. A gas bill of thirty-nine dollars was also claimed to have been paid by the claimant). Against the sale of the articles in this schedule I protested, and they were afterwards sold, I think, at or about the prices named in said paper. I claimed that I had purchased all these articles when I purchased the lease, good-will, and fixtures. I claimed that they were included under the sale of the lease, good-will, and fixtures. It cost me considerable more than these articles sold for, to replace them.

Q. Do you know whether Mr. Hitchings, the bankrupt, had bought these articles as a part of the lease, good-will, and fixtures from Mr. Cuyler, who had kept the store there previously?

Objected to by Wm. B. Robins, Esq., assignee.

A. I know from Mr. Cuyler, who told me that these articles had been sold by him to Mr. Hutchings in the sale of the lease, good-will, and fixtures.

Examined by Mr. Robins.

I made no exception to the return of the sale, except that I had protested at the time of the sale. I thought that the only thing that needed confirmation was the sale of the lease. I did

not appear at the first meeting of creditors to make my claim. I didn't know of the time of any meeting of creditors.

By the Register.

On the day of the confirmation of the sale I settled with the marshal. I paid the balance of my bid for the lease, good-will, and fixtures immediately after the confirmation of the sale. I don't know whether I made any claim of set-off, or any objection to the payment of the amount bid, on account of the sale of the articles mentioned at the time of my settlement with the marshal. I gave the claim to my father, who is my counsel, seven or eight months before the present time.

William B. Robins being duly sworn, was examined by Mr. Selden, as follows:

I was present during part of the sale of Mr. Hutchings' property. I heard you publicly protest against the sale of certain articles, all except groceries, on the ground that your son had bought them, when he bought the lease, good-will, and fixtures. Shortly after I was appointed assignee, you informed me that you intended to make a claim for the proceeds of certain articles, against the sale of which you had protested. You told me that you thought you could follow the fund, and didn't want to get in any controversy with the marshal.

By the Register.

I informed Mr. George S. Selden of this meeting of creditors, but not of the second meeting of creditors.

Samuel I. Wright, being duly sworn, examined by Mr. Robins:

I was deputy United States Marshal on the 29th of June, 1869, when I sold the property of Richard Hutchings, a bankrupt, under a special order of the court. I was specially deputized to sell this property. I sold the lease, good-will, and fixtures to C. C. Selden for one hundred and sixty-five dollars. I think the unexpired term of the lease, good-will, and fixtures were sold prior to the stock of groceries, etc. I offered for sale the unexpired term of the lease of the store, and the good-will and fixtures. The question was asked, I think, by the landlord, Who was to pay the back rent? It is my impression that

I told him it would come out of the fund. I think it was also asked whether the gas bill would be paid? These announcements were made publicly. I stated generally that I supposed the back rent and the gas bill would be paid, I think all present at the sale heard these statements. I don't think there was anything said by me, when making the sale, as to what would be embraced by the fixtures. I simply offered for sale the unexpired term of the lease, good-will, and fixtures, and asked for bids thereon. Before that offer I had offered the stock, good-will, fixtures, lease, and everything together, upon which I got no satisfactory bid, none as high as the appraisement. I then offered for sale the unexpired term of lease, good-will, and fixtures as before stated. When I afterwards offered for sale the scales, marble meat slab, and several other articles, Mr. C. C. Selden objected. He claimed that he had bought those as part of the fixtures; I said I didn't understand it that way,—that I didn't understand I was selling those as part of the fixtures; he replied that he claimed them as part of his purchase, when he purchased the fixtures; he bought some of the articles, to the sale of which he had objected; he bought the scales, I cannot tell what else; he had paid me no deposit on the lease, good-will, and fixtures, when he protested against the sale of the articles referred to; he didn't pay anything until the sale was concluded; he had an opportunity to withdraw his bid; he paid me fifty dollars at the close of the sale; I don't remember of his making any objection then; he didn't settle finally with *me* at the marshal's office.

None of the articles mentioned in the paper produced were mechanically fastened or affixed in any way to the building, except the awning frame; with that exception they were all readily movable; the marble slab, I think, was fitted to the counter.

Cross-examined.

That (bill produced) is one of the hand-bills of the sale. I have an impression that I said something about withdrawing his bid, but I cannot say for certain.

Williams B. Robins re-examined:

I was present when the sale of the meat slab and several other articles was objected to; I heard nothing said about the bidder for the fixtures having the right to withdraw his bid.

REPORT OF THE REGISTER.

Upon consideration of the foregoing testimony, I am of opinion, that the sale by the marshal, as messenger under the order of the court, is to be regarded as in the nature of a sale made by a provisional assignee, and that the claimant is entitled to be paid out of the fund in the hands of the assignee, the sums for which the following articles were sold, viz.:

Awning frame	$36 00
Awning as accessary thereto	29 00
Marble meat slab, fitted to a counter	8 00
Total	$68 00

and that those are the only articles which could properly be designated fixtures and pass to the purchaser of fixtures, and that the amount of the gas bill paid by said claimant for gas furnished prior to said sale, should be refunded by the assignee.

J. MASON,
November 11, 1870. *Register.*

The assignee made the following exceptions to the report of the Register:

First. Because he has decided that any of the articles sold at the marshal's sale as fixtures, were afterwards sold by the marshal.

Second. Because the Register has awarded any sum of money from balance in assignee's hands to Conner C. Selden.

Exceptions were also made by the claimant, but none appear to have been filed of record.

After argument, on December 28, 1870, it was ordered by the court, Cadwalader, J., that the exceptions of the assignee and of Connor C. Selden, to the report of the Register in said matter, as to the claim of said Conner C. Selden to the proceeds of certain articles sold by the marshal as messenger un-

der an order of the court, be overruled, and the report confirmed, and the assignee be directed to carry it into effect.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

An act of bankruptcy committed a long time before the passage of the United States Bankrupt Act of 1867, is no ground for refusing a discharge.

A bankrupt may sell property to raise money for the purpose of procuring means to defray his expenses in contemplated bankruptcy proceedings, provided he does not sell at a sacrifice, and that the sum so raised is reasonable in amount.

A specification in opposition to a discharge, to conform to the requirements of Section 29 of said Bankrupt Act, must allege willful false swearing as well as willful omission from schedule.

In re KEEFER.

LONGYEAR, J.—Opposition to discharge on specifications filed by Rowland Swift, a creditor who has proved his debt against the said bankrupt's estate.

The first specification is substantially, that the bankrupt, on the 12th day of March, 1861, caused certain real estate to be conveyed to his wife, Elmira C. Keefer, with intent to hinder, delay, and defraud the creditors of the said bankrupt.

In re Rosenfield, 1 N. B. R., 575, Judge Field, of the District of New Jersey, held that in such case, the act, in order to constitute a bar to a discharge, must have been committed since the passage of the Bankrupt Act. I fully concur in the reasoning and conclusion in that case. The act being alleged to have been committed a long time before the passage of the act, is therefore no ground for refusing a discharge.

There is an allegation in said specification, that "said bankrupt has willfully omitted said premises from the schedule attached to his said petition." This is entirely insufficient, for the reason that it is not alleged that the bankrupt has willfully sworn falsely in his affidavit annexed to his schedule or inventory, as expressly required by the act. (Section 29.)

The second specification is, in substance, that on the 25th day of May, 1868, the bankrupt, in contemplation of bank-

ruptcy, and by way of preference, and to prevent the same from coming to the hands of his assignee, sold certain real estate to one Henry Waldron.

This specification is not supported by the proofs. It appears that the land was sold by the bankrupt for cash, and for the purpose of procuring means to defray his expenses in the contemplated bankruptcy proceedings. It is well settled that a bankrupt may use money for that purpose, and I can see no good reason why he may not sell property to raise money for the same purpose, provided he does not sell at a sacrifice, and that the sum so raised is reasonable in amount.

The third specification is not sustained for the same reasons above given as to the second.

The fourth and last specification is, in substance, that the bankrupt "fraudulently neglected and willfully omitted to include" certain specified personal property claimed to be owned by the wife of the bankrupt, "and all the above described real estate in his petition and inventory." But here again, as in the first specification, there is no allegation of willful false swearing, as is necessary to make the specification conform to the requirements of Section 29 of the Bankrupt Act.

The opposition to discharge is therefore not sustained.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where an adjudication has been made on a voluntary petition, and a warrant has issued for the first meeting of creditors, and the matter of said petition is still pending without any discharge or discontinuance, and the bankrupt files a second petition in which the same debts and the same creditors are named, the choice of an assignee will not be made in the second proceeding pending the first, and an order will be made staying the proceedings under the second petition.

In re WIELARSKI.

I, EDGAR KETCHUM, one of the Registers of said Court in Bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to

by the counsel for the opposing parties, to wit: Mr. J. P. Solomon, who appeared for the bankrupt, and Mr. Henry Brash, who appeared in person, as one of the creditors of the said bankrupt.

The bankrupt, in December, 1868, filed in this court his petition in bankruptcy, and it was referred to Mr. Register Allen, who made adjudication thereon, and issued his warrant for the first meeting of creditors, which was held, and at which an assignee was appointed.

The matter of said petition is still pending, without any discharge or discontinuance, and, while so pending, the bankrupt filed his petition in this matter in December, 1870, and the same debts are set forth and the same creditors named in both petitions.

Mr. Brash, now attending the first meeting of creditors in this matter before me, objects to proceeding for a choice of assignee herein, during the pendency of the former petition, on the ground of irregularity, which he insists the court will not allow, and I am of opinion that his objection is well taken.

EDGAR KETCHUM,
Register.

BLATCHFORD, J.—The Register is correct in his view. The clerk will enter an order staying proceedings in this matter, until the further order of the court. If any good reason exists for going on with the proceedings in this matter, it may be shown to the court.

UNITED STATES DISTRICT COURT—S. D. NEW YORK

The defendant in an equity suit, must account, before a master, for property received by him. Orders of reference to a master will be settled on notice.

BENJAMIN, *Assignee, etc., v.* GRAHAM.

In Equity.

BLATCHFORD, J.—In this case the defendant must account

before a master for the moneys, notes, and merchandise received by him from Lockwood & Marsh, embraced in the twenty-three items set forth in his answer, the account to embrace interest on the moneys and on what shall be found to have been the value of the notes and merchandise, such interest to be computed from the commencement of this suit. The order of reference to the master will be settled on notice.

C. H. Woodbury, for the plaintiff.

T. Darlington, for the defendant.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where the warrant to a marshal transcends the power conferred on a United States Court by Section 40 of the Bankrupt Act, property taken possession of by the marshal from a person other than the bankrupt, cannot be held by the assignee in bankruptcy. Upon the petition of one so aggrieved, the assignee will be required to deliver the property in kind; and if this is impossible, then in default to pay over the proceeds.

In re HARTHILL.

BLATCHFORD, J.—Irrespective of any determination of the question of fact as to the validity and *bona fides* of the purchase made by Henry from the bankrupt, I am entirely satisfied that the warrant issued to the marshal, in so far as it commanded him to take possession of the property which had been conveyed by the bankrupt to Henry, transcended the power conferred on this court by the 40th Section of the act. It should have stopped with commanding the marshal to take possession of the property of the debtor. The warrant was issued on the 17th of June, 1868. The marshal having, under the warrant, taken the property from Henry's possession, Henry came into this court promptly by a petition on the 24th of June, 1868, and asked, by its prayer, that so much of the warrant as required the marshal to take possession of the property conveyed by the bankrupt to Henry, might be set aside. Such prayer must be granted, and the property so taken, or its proceeds, must be restored to Henry. He was no party to the proceedings

wherein the warrant was issued, and, by presenting his petition for relief from the operation of the warrant, he does not make himself a party to the proceedings, or submit himself to the jurisdiction of the court any further than is necessary to obtain the specific relief he asks. He is entitled to such relief, and to depart, having obtained it, leaving the assignee in bankruptcy to take such affirmative proceedings against him, both in respect to the property which the marshal seized, and to the other property which was conveyed by the bankrupt to Henry, and to the proceeds of all of such property as may be proper. No such affirmative proceedings are before the court, instituted by the assignee; it is only as the result of them, that he can have the relief which he now asks by motion. Such proceedings must be taken by a pleading, making proper averments, and calling for an answer, on which an issue raised can be tried, leading to a determination which the aggrieved party can have reviewed. The proceeds of the property seized by the marshal from the possession of Henry, if they are in this court, are not in it as belonging to the estate of the bankrupt, nor can they be in it to be awarded according to the merits of the case, as between the bankrupt's creditors and Henry, unless they are rightfully in it. They are not rightfully in it. For all the purposes of Henry's petition, which is the only matter before the court, the property taken from Henry must be regarded as still in the possession of the marshal, it having been sold only because it was perishable, and the proceeds having been paid into court for safe keeping. The marshal's possession of the property having been taken under a warrant which was improperly issued against such property, the property must be released from the marshal's possession, and must revert to the possession of Henry, so far as any disposition of it on Henry's petition is concerned. Its proceeds must take the same course.

F. H. Bangs, for Henry.

J. S. Ritterband, and *Gleason & Babcock*, for assignee.

UNITED STATES CIRCUIT COURT—NEVADA.

Where an order was made by the District Court, vacating the adjudication of a corporation as bankrupt, because the proceedings in which the petition was filed were informal and unauthorized. On an application made to the Circuit Court to reverse such order,

Held, that the order vacating the adjudication was correct. Where the petition in bankruptcy was filed without proper authority, the Register acquired no jurisdiction. Under the provisions of the 37th Section the filing of the petition must be "duly authorized by a vote of the majority of the corporators, at any legal meeting called for the purpose." No other petition can be recognized under the act.

A corporator is one of the constituents or stockholders.

Although the management of a corporation may be committed to a Board of Trustees, by the laws of a State, that of itself does not authorize them to file a bankruptcy petition, under an act of Congress, whereby others have been clothed with the requisite power.

The action of a board is not the action of the corporation. The corporation must act at a meeting "called for the purpose."

Subsequent ratification, by stockholders, does not cure the defect of a want of jurisdiction in the Register, at the commencement of the proceedings.

In re "Lady Bryan Mining Company."

On motion of a creditor, having a lien by attachment, to vacate the order adjudging the said company a bankrupt.

The facts are as follows:

The Lady Bryan Mining Company is a corporation organized under the laws of Nevada, and carrying on the business of mining in Storey county. On the 15th of August last, its Board of Trustees, at a meeting thereof, authorized Geo. W. Hopkins, the secretary of the company, to file a petition for the purpose of having the said company adjudged a bankrupt. The petition was filed pursuant to such authority, on the 17th day of August. Thereupon, and prior to the 31st day of August, the Register adjudged the corporation to be a bankrupt. On the 29th day of August, the Board of Trustees called a Stockholders' Meeting, to be held at Virginia City, on the 31st of that month. A meeting of the stockholders was held on that day, at which four stockholders, representing thirteen thousand three hundred and eighty-nine shares, were present. At this meeting a resolution was passed ratifying the action of the secretary in

filing the petition, and of the Register adjudging the company a bankrupt.

The total number of shares into which the capital stock of the company is divided, is eighteen thousand.

Ely Johnson, the moving party, is a creditor having a lien by attachment upon the property of the corporation.

Upon these facts the District Court held (4 N. B. R., 144):

First. That the Board of Trustees had no power to authorize the secretary to file the petition, and that such filing gave the court no jurisdiction to adjudge the corporation a bankrupt.

Second. That the only reasonable construction of the words "majority of the corporators" in the 37th Section of the Bankrupt Act, is to so interpret them as to enable the holders of a majority of the shares of the capital stock to authorize the filing of a petition under that section.

Third. That when a corporation seeks to avail itself of the provisions of the Bankrupt Act, it can do so only in the mode prescribed by the act, and that the petition in bankruptcy can only be filed by authority of the corporators holding a majority of the shares of stock, given at a legal meeting called for that express purpose.

Fourth. That where, as in this case, the commencement of proceedings is unauthorized and void, no subsequent ratification by the corporators can make the proceedings valid. And an order was made vacating the adjudication.

After the entry of this order in the District Court, a petition was filed by the corporation in the Circuit Court, praying that it might be reversed.

SAWYER, C. J., in affirming the order made by the court below, said:

I am satisfied that the action of the District Court, in vacating the order of the Register in Bankruptcy, was correct. The petition in bankruptcy was filed without proper authority, and the Register acquired no jurisdiction. The petition, under the 37th Section, must be "duly authorized by a vote of the ma-

jority of the corporators at any legal meeting called for the purpose."

No other petition on behalf of the corporation can be recognized under the act. A "corporator," as understood both in the law respecting corporations, and in common speech, is "one who is a member of a corporation." That is to say, one of the constituents or stockholders of the corporation. I do not know that the word has ever been used in any other sense.

We do not know what motive induced the limitation to corporators, but, probably, it was supposed that, in a matter of so much importance, the constituent members of the corporation ought to be consulted. Whatever the motive, this is the provision of the act, and we are not authorized by a strained, or fanciful construction to make it something else. It is the province of courts to interpret, and not to make, statutes.

The management of the ordinary business of corporations in the State of Nevada, by the provisions of the statutes of the State, has been committed to a Board of Trustees, but it does not follow that the trustees may authorize the filing of a petition in bankruptcy under the Act of Congress. Congress has power to pass a general Bankrupt Act, and to prescribe the conditions upon which the benefits of the act may be attained, and the mode of procedure for their attainment; and when prescribed, these conditions must be complied with. It is no interference with the State laws respecting corporations to require the consent of the corporators in person, rather than that of the Board of Trustees, as a condition precedent to the filing of a petition in bankruptcy, and this condition has been imposed by the Bankrupt Act. For this purpose, the action of the Board of Trustees cannot be regarded as the action of the corporators. The corporators themselves must act in a meeting "called for that purpose."

I am also of opinion, that the act of the Register being void for want of jurisdiction at the time the order was made, a subsequent ratification could not render it valid. It is not a matter of agency so far as the authority of the Register is concerned, but of jurisdiction.

The petition itself shows the authority upon which it was filed to be a resolution passed by the Board of Trustees, and consequently, the want of due authority and of jurisdiction appeared upon the face of the record.

The petition must be denied, and the order of the District Judge affirmed, and it is so ordered.

UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

Where creditors, prior to the commencement of bankruptcy proceedings by other creditors, recovered a judgment, and caused execution to be issued and levy made on certain property of the debtor, and also commenced supplementary proceedings in a State court, and had a receiver appointed for certain choses in action, and where, after the adjudication of the debtor's bankruptcy, the receivership under the State court was extended to all the debtor's property, and the assignee in bankruptcy was not made a party thereto,

Held, the appointment of an assignee in bankruptcy relates back, and clothes him with title to all the bankrupt's legal and equitable rights and interests, and choses in action, which belonged to him on presentation of petition.

From and after filing of petition in bankruptcy a creditor in a State court acquires no rights, which a decree in bankruptcy would not annul.

The creditors who, having had reason to believe that the debtor was insolvent (neglecting payment of debts, permitting suits, and neglecting to take advantage of the Bankrupt Act for the benefit of his creditors without preference, endeavored to secure a preference, and were acting in fraud of the act).

As payment of money under such circumstances is a preference; the obtaining of it by legal proceedings, not prevented by the debtor availing himself of the law, is adverse to the fundamental principles of the law, and cannot withstand the claims of other creditors and those of the assignee in bankruptcy.

Although a debtor, previous to committing an act of bankruptcy, may be sued, and on recovery of judgment an execution, levy, and sale may follow, and although mere insolvency is not sufficient grounds on which to make a decree of involuntary bankruptcy, yet, if the debtor suffers a preference of creditors by means of such judgment or otherwise, that of itself will be an act of bankruptcy. And such advantage, obtained by creditors having reasonable cause to believe their debtor insolvent, must yield to the right of the assignee, provided other creditors file their petition within six months.

Smith, *Assignee, etc.*, v. Buchanan *et al.*

On deciding this case Judge Woodruff stated his opinion orally, but in substance as follows:

The defendant herein, before the debtor was decreed a bank-

rupt, and before the petition therefor was filed by other creditors, prosecuted suits and recovered judgment, caused executions to be issued and levied on certain personal property of the bankrupt; and commenced proceedings supplementary to execution in State court; and procured the appointment of a receiver of certain choses in action of the bankrupt.

On the petition of other creditors a decree in involuntary bankruptcy was obtained, and after this, the receivership aforesaid was extended by the State court to all the property of the bankrupt. The proceedings for the last named extension was begun before the filing of the petition of the creditors, and the assignee in bankruptcy was not thereafter made a party thereto.

The appointment of the assignee in bankruptcy relates back, and gives to him title to all the estate, real and personal, legal and equitable rights, interests, and things in action which belong to the debtor on the presentation of the petition. I find, therefore, no room for hesitation in saying, that from and after the filing of the petition, the defendants could acquire no interest, by receivership or otherwise, in the property of the debtor, which the decree in bankruptcy would not displace or annul, and, therefore, the defendants are on that ground entitled to no benefit or advantage as against the plaintiff of anything done under orders of the State court, made after the petition of the creditors was presented.

But this discrimination is not necessary. I am constrained to find, as facts, that every step of the proceeding by the defendants, from and including the time of the commencement of their suits against their debtor, was done with reasonable cause to believe, and with actual apprehension, if not actual belief, that their debtor was insolvent. That debtor is a corporation, and the defendants acted in the further belief that the officers of the corporation were either fraudulently disposing of, or appropriating its property, or that they were paying other creditors in preference to the defendants.

The defendants, with such reason to believe that the debtor was insolvent, had, therefore, reason to believe that the conduct

of the debtor in neglecting to make payments of its debts, in submitting to suits, and in neglecting to take the steps contemplated by the Bankrupt Law, to distribute its estate, for the proper and equal benefit of all its creditors, according to the plain intent and purpose of that law, was acting in fraud of the law itself.

The defendants commenced and prosecuted their suits and all the proceedings therein, with a view to secure payment without regard to other creditors, and whether the latter were paid or not.

They knew that if they obtained payment in full, it must be at the expense of other creditors who could not be paid in full, and that if they succeed, they would secure a preference.

In this condition of things, if the debtor had paid them the money, such payment would have been an act of bankruptcy, and the plaintiff would be entitled to recover it back from them. How then can they be permitted to secure it by legal proceedings, and this debtor suffer those proceedings to be prosecuted to full and final effect, without taking measures to be declared a voluntary bankrupt, and the preference accomplished in that mode be permitted to stand against the other creditors, against the title of the assignee, and against the fundamental principles of the Bankrupt Law and that which it aims to secure, viz.: the equal distribution of the property of the bankrupt among his creditors *pro rata*.

It is true, that until the debtor commits an act of bankruptcy, any creditor may lawfully sue him and proceed to judgment, execution, levy, and sale. It is also true that mere insolvency is not declared bankruptcy, in such sense that the creditor can obtain an involuntary decree against him. But every such suit against an insolvent is prosecuted, subject to the consequence, that if the debtor suffers the plaintiff to obtain any advantage, by judgment, or otherwise, over the other creditors, that will be of itself an act of bankruptcy, and all such advantage obtained by the creditors having reasonable cause to believe the debtor to be insolvent, must give way to the right of the assignee. This is, of course, subject to the qualification

which the 39th Section of that act implies, namely: that the other creditors file their petition within six months.

There must be a decree according to the prayer of the bill of complaint.

Geo. Gorham, for plaintiff.

Bangs, Sedgwick & North, for defendants.

UNITED STATES DISTRICT COURT—CONNECTICUT.

A gift is not in itself a sufficient consideration to support a promise of payment, even if expressed in a note, neither is a mere moral consideration sufficient to support a promise to pay. A note given in place of a lost note, if there was no consideration for the making of the original (or lost) note, whether a voluntary gift, is not a sufficient claim on which to base a petition for bankruptcy proceedings.

In re CORNWALL.

SHIPMAN, J.—This was a creditor's petition, brought by Nathaniel O. Cornwall, praying that David Cornwall might be declared a bankrupt. The petitioner alleges that his demand exceeds the sum of two hundred and fifty dollars, and that the respondent has committed an act of bankruptcy within six months next preceding the filing of the petition. These allegations are denied by a special answer. The indebtedness of the creditor is thus stated in his petition:

"A certain promissory note for money loaned to and signed by said David Cornwall, payable to the order of your petitioner, of which the following is a copy:

"'PORTLAND, August 29, 1869.

"'For value received I promise to pay Nath'l O. Cornwall, or order, five hundred dollars on demand, with interest from date.

"'$500. (signed) DAVID CORNWALL.'

"The further sum of five hundred and twenty-eight dollars and eighty-eight cents, loaned to the said David Cornwall, July

14, 1854, the receipt of which is acknowledged in writing, with promise to deposit said sum for petitioner's benefit in the savings bank, etc., amounting to one thousand and twenty-eight dollars and eighty-eight cents, exclusive of interest."

The answer of the respondent avers, that the note was without consideration, and therefore void, and that the alleged loan of five hundred and twenty-eight dollars and eighty-eight cents is barred by the statute of limitation. A brief statement of facts will show the light in which these transactions are presented.

The respondent is an old gentleman eighty years of age. The petitioner is his son. In 1854 the latter was in South America, engaged in business, while the former resided at Portland, in this State, where he had always lived. He was somewhat embarrassed by debts. He had given the petitioner a liberal education, part of the advancements for which had been made to the latter after he was twenty-one years of age. Some of these advancements had been paid by the petitioner, but whether or not all had, does not clearly appear, and is not important. Prior to 1854 the respondent had written the petitioner asking for a loan to assist in paying off his debts. In March, 1854, the petitioner forwarded to the respondent a bill or order, on a house in New York, for five hundred and ten dollars, which, when received by the respondent, amounted, with interest, to five hundred and twenty-eight dollars and eighty-eight cents. In the letter containing this remittance the petitioner requested the respondent to deposit the avails in some savings bank paying six per cent., in the name of the former, so that the same would not, in the event of the respondent's death, become mingled with the latter's estate. He also informed the respondent that he could collect the interest as it became due and make use of it, adding, "I intend this to be the beginning of a sinking fund which may help to clear off your embarrassments in time." The respondent, on the 14th of July, 1854, wrote the petitioner advising him of the receipt of the amount, and stating that he had not deposited it as requested, but had applied it in payment of his (respond-

ent's) "church debt," adding, "and shall, as soon as it is in my power, deposit (it) in the savings bank, according to your direction." In November following the respondent wrote again, substantially to the same effect. Both these letters were received by the petitioner, and there is no proof in this case that the latter ever made any objection to the disposition made of the money. On the contrary, I infer from the evidence, and find as matter of fact, that he acquiesced. I find, too, from the evidence of the petitioner himself, that he never expected to call upon the respondent for the payment of this money, but did expect to collect the amount out of the latter's estate after his death. No promise has ever been made by the respondent to pay this sum since November 3d, 1854.

The question arises, is the statute of limitation a bar to this claim? It is obvious that it is so, unless the claim of the petitioner, that it was not an ordinary debt, but a trust against which the statute did not run, is well founded. Undoubtedly, where a trust in the strict and technical sense exists, cognizable only in a court of equity, it will not be affected by the statute of limitations. As was remarked by Lord Redesdale, in Howendon and Lord Anresly, 2 Scho. & Lef., Ch. R., 607; "if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust:* and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title." But he is here speaking only of direct trusts and those over which courts of equity have exclusive jurisdiction. Direct trusts are usually created by deed or will, though trusts equally binding sometimes arise out of other acts of the parties or the relations to which the law holds them, jurisdiction over which belongs exclusively to courts of equity. But no such trust was created in this case. The respondent was never the trustee of this five hundred and ten dollars. He was the agent of the petitioner to deposit it in the savings bank, and although his failure to comply with the request of the petitioner was in a certain popular sense a breach of trust, it was not so in any sense known to the law. The

respondent converted the sum sent him to his own use, and immediately informed the petitioner that he held himself as his debtor for the amount, and that he would place it to his credit as soon as he could. To this the petitioner made no objection. The latter describes it in his petition as a "loan to the said David Cornwall." He never asked him to repay it, but says in his testimony that he did not expect to collect it from him while he lived, but intended to collect it of his estate after his death.

I think it no strained inference to hold, as matter of fact, that the petitioner assented to the disposition made of the money, and treated it as a debt due him from his father. His notion that the law would still regard it as a trust, and thus exempt it from the bar of the statute, cannot change the fact nor the principles applicable to it. From the day he was advised of its conversion and assented to it, it was a *legal* debt, enforceable at law and not in equity. No preliminary demand was necessary, for the conversion was admitted, and, as I have already said, impliedly assented to. From that date it was a simple legal demand, upon which the statute of limitations ran. No subsequent promise has ever relieved it from the operation of the statute, and as it is now set up in answer to the demand, it is a conclusive bar.

As to the note for five hundred dollars. The origin of this was somewhat peculiar. The petitioner, in 1859, returned from South America on a visit, and while at his father's home in Portland, which was then in a somewhat dilapidated condition, the propriety of some repairs on it was a subject of conversation in the family. The respondent said he was not able to defray the expense. The petitioner urged that the repairs be made, and voluntarily advanced the money five hundrd dollars for that purpose. He says the advance was a loan, while the respondent insists that it was a gift. On this point the evidence is conflicting. But after mature consideration, I find, as matter of fact, that the advance of this five hundred dollars was, in terms, and so understood by both parties at the time, an absolute gift. Two hundred dollars were immediately advanced, and the balance a

few months later. After the first two hundred dollars were paid, and before the payment of the balance, the petitioner requested the respondent to give him a note for the whole five hundred. As to the reasons which induced the petitioner to ask for the note, the evidence is also conflicting; but I find, as matter of fact, that he obtained the note after objection by the respondent, and on the assurance that the whole sum of five hundred dollars was a free gift, and that he did not intend to require the respondent to pay it; but that he would hold it, and in the event his father should become embarrassed again, the petitioner could, by means of the note, realize something out of the estate for the benefit of his mother and sisters.

Passing now the element of possible prospective fraud in this transaction, let us inquire what was the real consideration of this note?

It was this absolute gift of five hundred dollars—a gift made, not on request of the donee, but voluntarily and freely by the donor, and accepted by the donee. The note was not exacted on consideration of the two hundred dollars which had been paid, nor as a condition on which the three hundred dollars more was to be paid. The only consideration was this gift. This was not such a consideration as will support the promise contained in the note; at most it was only a moral consideration, which, as Baron Parke said in *Jennings* v. *Brown*, 9 M. & W., 501, is *nothing*. Notwithstanding some *dicta*, and perhaps decisions, to the contrary, it is now settled that a mere moral consideration is not sufficient to support a promise. In *Eastwood* v. *Kenyon*, 11 A. & E., 438, it was decided that a pecuniary benefit, voluntarily conferred by the plaintiff and accepted by the defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise by the defendant to reimburse the plaintiff. Lord Denmore, in giving his opinion in that case, cited with approval from the note to *Wennall* v. *Adney*, 3 B. & P., 249, the doctrine that "an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some posi-

tive rule of law; but can give no original cause of action if the obligation on which it is founded could never have been enforced at law, though not barred of any legal maxim or statute provision." Now, a gift made and accepted leaves the parties thereto just where they were before, so far as their legal relations are concerned. The gift is not recoverable back, any more than a promise to make a gift would be enforceable. The law will not enforce its restitution or damages for its detention, through the medium of an implied promise, not because of any rule of public policy, such as renders the contracts of infants and married women, or contracts *contra bonas mores*, void; but, because no legal obligation or duty ever existed, whatever the condition of the parties, or the time, or circumstances of the transaction, upon which the law will raise an implied promise. An express promise, therefore, founded upon a naked gift, can never have anything more than a moral consideration to support it. There is no legal obligation or duty which such a promise can reach and rest on. There never was any legal duty or obligation, once existing, but afterwards barred or suspended, for such a promise to reach and revive. Such a promise, therefore, rests, in the terse language of Baron Parke, upon *nothing*.

Though the note described in the petition is dated and was actually given in 1869, yet it was a mere substitute for the first one given in 1859, the latter having been lost. It was given upon the request of the petitioner, and upon no other consideration than the first one. It was a mere renewal or repetition of the original promise, and is, like that, without consideration and void. It follows that the creditor has proved no demand against the respondent. This conclusion renders the consideration of the alleged act of bankruptcy unnecessary. Let the petition be dismissed with costs.

E. E. Marvin, for the petitioner.

Charles E. Perkins and *Alfred Hall*, for the respondent.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

An assignee who fails to deposit funds in his hands belonging to the estate of which he is the assignee, as required by the rules of court; who suffers the foreclosure of a mortgage, neglecting an opportunity to purchase it at less than its face; is guilty of similar neglect in regard to a judgment; pays money out of the estate to satisfy the judgment after a levy by the sheriff; pays seven per cent. interest while he is loaning moneys belonging to the estate at six per cent., and also fails to comply with the directions of the Register, as required by the Bankrupt Act and rules of court, will be required to show cause why he should not be removed from his trust.

Register directed to employ counsel to represent the estate of the bankrupt at the hearing of the order to show cause.

In re PRICE.

I, the undersigned Register, in charge of the above bankruptcy, do hereby bring to the notice of this court the failure by Stewart Young, the assignee in said bankruptcy, to comply with the provisions of the rule of this court, adopted November 13, 1869 (3 N. B. R., 304, see Rule), although the said assignee has, from time to time, had his attention called to said rule by the undersigned, and said assignee absolutely refuses to make and file any account whatever in the above matter.

JOHN W. LITTLE,
Register.

In connection with the foregoing certificate the undersigned respectfully makes the following statement to the court of the condition of the estate of the above bankrupt, which has but recently come to his knowledge.

Stewart Young was duly chosen assignee in the above bankruptcy on the 8th day of November, 1869; such choice was duly approved, and an assignment of said bankrupt's effects has been duly made to him; said estate consisted of both real and personal property, which were incumbered by mortgages. Soon after said assignment, said assignee entered upon, took possession of, and sold, all the assets of said estate, for about fourteen thousand dollars, without any order or direction from said court, but said assignee has not yet delivered a deed to the

purchaser of said real estate; that the undersigned is informed by said assignee that he has received a considerable portion of said price, and still holds the same in his possession, never having deposited it, or any part thereof, as required by the Rules of this court. That since said sale and the proceeds thereof came into the hands of said assignee, he has suffered an action to be commenced in the Supreme Court of the State of New York to foreclose a mortgage "past due" on the real estate of said bankrupt, which, at time of sale, said assignee agreed with the purchaser thereof, to pay out of the proceeds of the sale of said real estate; and a judgment of foreclosure and sale, with a large amount of costs to be entered therein at the Circuit of said court by default, and said real estate is now advertised to be sold by the sheriff of Orange County under said judgment of foreclosure and sale, on February 11, 1871; that the owner and holder of said mortgage, before said action was brought, and before judgment thereon, offered to accept from said assignee a sum less than the principal secured thereby, without suit and without judgment, but said assignee refused to compromise the same.

That said Stewart Young also suffered another judgment to be taken against him at the same Circuit by default, by reason of an action taken, commenced in said court against him individually, to recover the amount of a debt against said bankrupt, secured by a chattel mortgage on certain personal property belonging to said estate, which had been taken and sold by said assignee as a part of the assets of such estate; that such judgment also includes a large amount of costs. The owner and holder of the mortgage in this case also offered to compromise the claim before said Circuit and before judgment for a less sum than the amount secured by his mortgage, but said assignee refused to compromise the same; that said last mentioned judgment was taken against the said Stewart Young individually at said Circuit by default, and that said Young has since paid the same out of the estate of said bankrupt to the sheriff of the County of Orange.

That said assignee has loaned the funds belonging to said

estate upon individual notes without security, and without authority or directions from the court, at the rate of six per cent. per annum interest, and paid interest out of the estate on secured debts at the rate of seven per cent. per annum.

JOHN W. LITTLE, *Register.*

BLATCHFORD, J.—The Register will forthwith have issued out of this court and served on the proper parties, an injunction restraining the sale before named, advertised for February 11th, 1871. He will also cause to be served on the assignee a copy of the foregoing papers, with a notice requiring said assignee to show cause before this court on Saturday, February 18th instant, at 11 o'clock A. M., why he should not be removed from his trust. The Register will employ on behalf of the estate some proper counsel to represent the estate and the creditors in the matters set forth in the foregoing papers.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where no bond has been filed in a case of appeal, as required by Section 8 of the United States Bankrupt Act of 1867, no appeal can be allowed after the expiration of ten days from the entry of the decree.

Where, however, the bond is proper in form, and the sureties are sufficient, the United States District Court will approve it as a bond which would be a proper one if given in time, leaving it to the appellee to move the appellate court to dismiss the appeal if such a course shall seem proper to him.

Where the court cannot approve the bond as proper in form, and the delay in filing has been more than ten days, the issuing of execution on the decree will not be stayed.

BENJAMIN, *Assignee*, v. HART.

BLATCHFORD, J.—This is a suit in equity. The final decree, which was in favor of the plaintiff, was entered December 31st, 1870. The defendant, within ten days after the entry of the decree, gave notice to the clerk of this court and to the plaintiff, as required by Section 8 of this Bankrupt Act (this being a suit in equity in this court, under the jurisdiction created by

that act), that he claimed an appeal to the Circuit Court from the decree of this court. But the defendant did not, at the time of claiming such appeal, give or file any bond as required by such 8th Section.

That section provides that no appeal shall be allowed "unless the appellant at the time of claiming the same, shall give bond in manner now required by law in cases of such appeals," nor unless the appeal shall be claimed and notice thereof be given to the clerk and to the opposite party, within ten days after the entry of the decree appealed from. The defendant neither gave nor filed any bond within the ten days. Now after the expiration of the ten days a bond is presented to me to be approved, with a view to its being given and filed as and for the bond on such appeal. It is quite clear that as no bond was given within the ten days, no appeal can now be allowed. The right of appeal given by the 8th Section cannot be enlarged by this court. *In re* Alexander, 3 N. B. R., 6 *quarto*, 29. Still, if the bond is in proper form, and was properly executed and is in a proper amount, and the sureties are sufficient, there is no reason why I should not approve it, as a bond which would be a proper one if given in time, leaving it to the appellee to move the appellate court to dismiss the appeal, if such a course shall seem proper to him.

The bond is executed by the defendant and by two sureties. It is dated January 11th, 1871. It was sealed, and delivered, and acknowledged by the principal and one of the sureties on that day, and by the other surety on the next day. It is entitled in the Circuit Court for this district, with the name of the plaintiff and the name of the defendant. Then follows the bond, which is for six thousand five hundred dollars penalty, the decree being for three thousand one hundred and twenty-one dollars and ten cents. The condition of the bond is as follows:

"Whereas, the above-named Julius Hart has prosecuted an appeal to the Circuit Court of the United States for the Southern District of New York, to reverse the final decree rendered in the above-entitled suit, by the judge of the District Court of

the United States for the Southern District of New York; now, therefore, the condition," etc.

The only reference in the bond to the decree appealed from is the foregoing reference to it as a decree rendered "in the above-entitled suit." The names of the parties to the decree are not given otherwise than by a reference to the title at the head of the bond, nor is there any statement as to who the party is in whose favor the decree was rendered, except what may be gathered from the statement that Julius Hart has prosecuted an appeal to reverse the decree; nor is there any statement as to the court in which the decree was rendered, except the statement that it was rendered "in the above-entitled suit," and what may be gathered from the fact, that the appeal is stated to be to the Circuit Court for this district. The title of the bond is thus made by the bond itself a necessary part of it, and, reading the bond with the title, the decree appealed from is stated to be a decree rendered by the Circuit Court. The bond should have been entitled in the District Court. The printed form of bond used in this case is the one proper to be used on an appeal from the Circuit Court to the Supreme Court, and, as printed, is entitled in the Circuit Court. The plaintiff is entitled to a bond clearly and accurately stating by what court the decree appealed from was rendered. This is not such a bond.

This view is independent of the question as to whether the written word "Circuit" was inserted in place of the written word "District" in the title of the bond (the written word "District" having been previously put in place of the printed word "Circuit" in such title), after the bond had been executed by one of the sureties, and before it was executed by the other surety, and was so inserted without the knowledge or consent of the surety who first executed it. On that question I express no opinion.

It follows that I cannot approve the bond as proper in form, and that as no bond was given within the ten days, I cannot stay the issuing of execution on the decree.

C. H. Woodbury, for the plaintiff.

C. F. Whittemore, for the defendant.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where it is thought desirable, in order to obtain a better price for property, an injunction will be so far modified that the sale may take place under a judgment, and the referee may unite in the deed.

In re HANNA.

BLATCHFORD, J.—An order will be entered appointing the Register in charge of this case to be special custodian of the property advertised for sale under the mortgage to A. T. Stewart & Co., and directing him to sell the same under General Orders 19 and 21 and Rule 11 of this court, with such other advertisement of sale as shall seem to him proper, and to receive the proceeds of such sale and pay them into this court, they then to be deposited in the United States Trust Company, on interest, to the credit of these proceedings, as a separate fund, subject to the further order of this court. The deed to be given by the Register to the purchaser will convey a title under the order of this court, free from the lien of the mortgage of September 30th, 1869, in pursuance of Section 20 of the act, and the sale will be made free from such lien. The order will recite the application by A. T. Stewart & Co., and will direct that the lien of the mortgage be transferred from the property to be sold to its said proceeds.

If it is, or shall be thought desirable, in order to obtain a better price for the property, the injunction may be so far modified that the sale may take place also under the judgment, and the referee may unite in the deed. An order will be settled on notice to carry out these provisions.

F. N. Bangs, for A. T. Stewart & Co.

M. A. Kursheedt, for the petitioning creditors.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

An accommodation indorsement on a note does not make it commercial paper as to the accommodation indorser.

INNES *v.* CARPENTER.

THIS is a proceeding instituted by the petitioning creditor to recover from Jeremiah Carpenter the amount of a note made by Samuel Hanna, and indorsed by Jeremiah Carpenter, and delivered by said Hanna to Edward S. Innes for merchandise sold by said Innes to said Hanna.

BLATCHFORD, J.—As the note appears to have been indorsed by said Carpenter for the accommodation of Hanna, and was taken by the petitioners for wool sold to Hanna, I do not think it is commercial paper of Carpenter's as a merchant and manufacturer, within the act.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A majority in number and value of the creditors petitioned the court to appoint a meeting, that a vote might be taken upon the removal of the assignees. At the meeting the requisite majority voted for their removal, and reported their action for the consent of the court, which decided that it could exercise judicial discretion in the matter, notwithstanding the action of the creditors; and further, that it is not the intention of the United States Bankrupt Act of 1867, that the majority should have absolute control over the rights and interests of the minority, and that under the peculiar circumstances of the case the assignees ought not to be removed.

In re DEWEY.

LOWELL, J.—A majority in number and value of the creditors in this cause petitioned the court to appoint a meeting as required by Section 43, that a vote might be taken upon the removal of the assignee. At the meeting the requisite majority voted to remove them, and this action is reported to me for my consent. The statute which makes this consent necessary, and the form prescribed by the Supreme Court, which contem-

plates that the reason for removal should be stated in the petition, seem to require that I should exercise a judicial discretion in the matter, notwithstanding the action of the creditors.

The case shows that the bankrupt was a wholesale dealer in whiskey, and that, at the time of his bankruptcy, part of the goods which he had bought had been replevied by the sellers, the rest were in the hands of mortgagees or pledgors. The assignees have defended the replevin suit, and have brought suits in equity in this court against the mortgagees. In these last suits decrees were made by me, by the written consent of the parties, requiring the assignees to sell the whiskey at retail for cash, and pay the money into court, and authorizing the mortgagees to have the money paid over to them pending the litigation, on giving security for its repayment, in case the final decree should be against them. All this has been done, and the payments to the mortgagees have absorbed all the proceeds. There are no assets in the estate, unless the assignees prevail either in the replevin suit, or in one or both of the suits in this court.

The creditors allege that the assignees misconducted the sales of the whiskey, so that they failed to obtain as much as they might have got, by about two thousand dollars. On the other hand, the assignees say that they are amply able to respond to any sum which they ought to pay, if anything, in respect to the sales; and that the movement for their removal has been originated and conducted by and on behalf of the parties to the suits above-mentioned. And there is nothing remaining in the hands or under the control of the assignees but the settlement of these suits.

The evidence shows that these statements are true, and, on examination of the eight creditors, constituting the majority, taken in connection with the evidence, places the matter beyond doubt. I am always ready to hold assignees to a strict account, and shall do so in this case, but I hesitate to remove them in a case where such a course may seem to operate the very opposite effect from what is intended to be held as a pre-

cedent for punishing assignees for showing too great zeal in the conduct of their office.

It is not alleged that the defendants are acting oppressively or in bad faith in the conduct of the suits, and I am unwilling to admit that the parties opposed in interest to the official action of assignees should have the power to dictate their conduct, even if they happen to be able to command a majority-vote of the creditors themselves.

It is not the intention of the law that the majority should have absolute control over the rights and interests of the minority.

That the new assignee whom the creditors have chosen is a gentleman of learning and high character, does not meet this difficulty. The great danger is in the precedent of making the removal under the peculiar circumstances of this case. Consent refused.

H. D. Hyde, for petitioner.

R. M. Morse, Jr., for respondents.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

The right of a preferred creditor to prove his debt is conferred by the Bankrupt Act, independent of the second clause of Section 23, the operation of that clause being merely to suspend that right until such creditor shall have surrendered all property, etc., as therein provided, and in the construction of this clause it makes no difference whether the petition be voluntary or involuntary.

A creditor is only barred from proving his debt when a recovery has been had under Sections 35 and 39 of said Bankrupt Act.

In re Scott & McCarty.

At Detroit, in said district, on the 7th day of November, A. D. 1870, before Hovey K. Clarke, Register in Bankruptcy.

I, the above-named Register, do hereby certify that, on the 24th day of January last, Jeremiah Fisher filed his deposition to prove his claim against the above-named bankrupts' estate, the consideration of which was stated to be for money paid on

the 28th of August, 1869, to take up a note dated June 17th, 1869, payable sixty days after date, and which said Fisher had, at the date of said note, indorsed for the accommodation of said bankrupts; appended to the deposition was a chattel mortgage, dated August 18, 1869, the day before the note became due, executed by the bankrupts, conditioned to pay "a certain note dated June 17th, A. D. 1869, payable sixty days after date, for the sum of five hundred dollars, at the banking office of Fisher, Booth & Co., Detroit, and indorsed by said Jeremiah Fisher, party of the second part, and to save said Fisher harmless from all costs, damages, and expenses by reason of such indorsement; and also to save said Fisher harmless from all costs, damages, and expenses that may accrue to him by reason of the indorsement of any note or notes that may be made to renew or extend the payment of said five hundred dollar note, and to repay to said Fisher any sum of money he may pay on said note of five hundred dollars, or any note given to renew or extend the payment of the same, on demand."

The property covered by this mortgage is described as "all the stock of shelf-goods, groceries, and provisions, of the party of the first part, contained in the store now occupied by them in the National Block, on Genesee street, East Saginaw, Michigan, No. 317; also, such other goods kept by said first parties in said store, for sale, not enumerated in the above designation; also the counters, shelving, stove, and gas fixtures, and stove furniture, in the said premises; also, one harness and one delivery wagon, one box-stove and pipe."

The deposition filed, as above stated, to prove the claim of said Fisher, sets forth that "deponent has a chattel mortgage, hereunto annexed, marked *B*, on the property therein mentioned, given as security for his said claim, of which property the assignee has possession, and the estimated value of which is about fourteen hundred dollars. Deponent hereby releases and conveys his claim upon said property to the assignee.

On the 29th of March, 1869, A. R. & W. F. Linn, creditors, who had proved their claim against said bankrupt's estate, filed their petition for the re-examination of the said claim of said

Fisher, and alleged, in several specifications, objections to its allowance; whereupon I made an order appointing the 14th day of April for the hearing of said petition, at which time the parties appeared; said Fisher filed an answer and demurrer to said petition, and the examination of said Fisher and of James Moore was taken; and it appearing that questions of law and fact have arisen, as to the right of said Fisher to prove his claim against said bankrupts' estate, I have adjourned the same into court for the decision of the District Judge.

FACTS.

On the 18th day of August, 1869, Fisher, the claimant, was liable, as indorser for the bankrupts of their note of July 17, 1869, for five hundred dollars, payable sixty days after date. He has since paid the note, and the amount he claims is the amount he paid to take it up, less the amount of a store account the bankrupts had against him on that day, the 18th of August, one day before the note became due; and upon the statement by the bankrupts, that they would be unable to pay the note at maturity, they executed to the claimant, and he accepted, a chattel mortgage upon their entire stock of goods and fixtures, stated to be worth about fourteen hundred dollars.

OPINION OF THE REGISTER.

The Bankrupt Act, Section 39, provides that any person * * who, being bankrupt or insolvent, or in contemplation of either, shall make any * * conveyance or transfer of * * property * * with intent to give a preference to * * any person who * * may be liable for him as indorser, * * shall be deemed to have committed an act of bankruptcy. * * And if such person shall be adjudged a bankrupt, the assignee may recover back the * * property so * * conveyed * * or transferred contrary to the act; provided, the person receiving such * * conveyance has reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.

It is insisted by the objecting creditors, that on the 18th day of August, 1869, Scott & McCarty were bankrupt or insolvent,

that the conveyance of their stock which they made on that day by chattel mortgage to Fisher, was made with intent to give him a preference as an indorser of their note of five hundred dollars. They insist, also, that Fisher had reasonable cause to believe that Scott & McCarty were insolvent at the time he took the mortgage; and, therefore, that under the provisions of Section 39 of the Bankrupt Act, he shall not be allowed to prove his debt.

The bankruptcy or insolvency of Scott & McCarty; the intent to prefer their indorser Fisher; and the existence of a reasonable cause for belief of both these facts, by Fisher, are essential to the maintenance of the objections offered by the opposing creditors.

The nature of the transaction is such as to leave no room for doubt that the bankrupts intended to prefer their indorser. They convey to him their entire stock of goods and store fixtures, upon a condition which will be broken the next day, unless they pay the note which will then fall due, and which they have told Fisher they will not be able to pay. It is difficult to imagine a case more literally within the provisions of Section 35 of the Bankrupt Act, which declares that any transfer or conveyance not made in the usual and ordinary course of business of the debtor, shall be *prima facie* fraudulent; and this presumption, as I understand it, affects all parts of such a transaction as the one under examination. Such a sale the act declares to be "evidence of fraud," which, to mean anything, must include the bankruptcy, or insolvency, of the vendors, and their intent to give, and the intent of the vendee to accept a preference. This, however, is only a presumption; yet, I suppose it becomes, and is to be treated as conclusive, unless it shall be successfully rebutted. But I do not find anything in the testimony which does this. Fisher testifies, it is true, that he believed Scott & McCarty to be solvent; the question, however, is not of actual belief of solvency, but whether reasonable cause for belief of insolvency existed; and the testimony taken increases, rather than diminishes, the cause to believe the bankrupts to be insolvent at the time the mortgage was given.

The claimant, however, rests his right to prove his claim upon the fact, that he has surrendered the mortgaged property to the assignee, as stated in his deposition, and he claims, that, by such surrender, he is entitled to prove his debt, and share in the distribution of the proceeds of the bankrupts' estate. The middle sentence of Section 23 of the act, is cited in support of this claim; "any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made, or given, by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference." The conditional clause at the end of the sentence is construed to confer the right claimed.

To say that a creditor shall *not* prove *until* he surrenders, is certainly not equivalent to saying that he may prove when he surrenders; whether such a result be even admissible as an inference, may well be doubted. Possibly it would be, if such inference were not repugnant to any other provision of the statute, nor in conflict with its general policy as gathered from the whole of it. But there is in Section 39 a provision utterly repugnant to the exercise of the right claimed under Section 23, when the facts of the case are within the provisions of Section 39. These facts are: 1st. An adjudication under a creditor's petition. 2d. A preference to a creditor. 3d. Accepted with reasonable cause to believe a fraud on the act intended. When these conditions exist the prohibition of Section 39 applies, "such creditor shall not be allowed to prove his debt."

This point was decided in Walton's case before Judge Deady, in the District Court, for the district of Oregon, 4 N. B. R., 466. The facts of this case were, that the bankrupts had confessed judgments in favor of two of their creditors who issued executions and levied on the property of the bankrupts, and notwithstanding they professed that it was not their intention to get any preference in the final distribution of the

property, but that their object was to avoid the expenses of a division of the moneys under the Bankrupt Law, their acts were held to be in fraud of the Bankrupt Act; and though they made no resistance to the seizure by the marshal of the property covered by the execution, and offered to surrender any advantage or preference which they had obtained, they were not allowed to prove their debts. The judge in deciding the case, says:

When the question was first raised as to the right of Allen & Lewis and Henry Failing to prove their debts, I inclined to the opinion, that a creditor who had taken a preference contrary to the act, might in any case be allowed to prove his debt upon the surrender of the property, benefit, or advantage obtained by him under such preference, as provided in Section 23. But after long and careful deliberation, I am forced to come to a different conclusion; I am now satisfied that to allow these creditors to surrender their unlawful preference, and come in and prove their debts under Section 23, would be to violate both the letter and spirit of the act. It may be admitted that Section 23 is of general application in both voluntary and involuntary cases, except as otherwise provided in Section 39. But the special provision in the latter section, declaring that a creditor shall not be allowed to prove his debt in a *particular case*, so far excludes the operation of the general words of the former. Now, this special provision of Section 39 covers this case at every point, and therefore takes it out of Section 23.

Princeton's case, decided by Judge Miller in the District Court for the District of Wisconsin, is to the same effect. 1 N. B. R., 620.

The case of Montgomery, 3 N. B. R., 374, on the other hand, is regarded as an authority in support of the right for which the claimant contends. I thinkit not improper to say that this case seems to have been very hastily considered; one indication of which is that it assumes to state the provisions of the section above cited, thus: But Section 22 (Section 23, undoubtedly intended) provides, that if a person shall accept a preference, having reasonable cause, etc., he may never-

theless prove his claim and receive dividends, *if he surrender to his assignee all the property, etc.*, received by him under such preference." The important difference between a conditional and an absolute proposition, between permissive and prohibitive statutes, seems not to have attracted the attention of the Register who prepared the opinion, nor of the judge who approved it. The utmost that can be claimed for the clause in Section 23, is that it becomes permissive on the performance of a condition. To allow a *permissive* clause to control a *prohibitive* would certainly be a novelty in the construction of statutes. But to subject a prohibitive clause to the control of one that is only conditionally permissive, seems to me a construction too remote from any possible intention of Congress to require further consideration.

This case, Montgomery's, is also regarded as an authority for such a construction of the last sentence of Section 39, as makes a *recovery by the assignee from the preferred creditor* of the money, or property, received, as essential to bar the right of such creditor to prove his debt; and the opinion of the distinguished gentleman who is reputed to be the author of the Bankrupt Act, and who for this reason is supposed to be well informed as to the intention of the law-makers, is cited as favoring this construction. This, so far as I know, is the only precedent for this method of ascertaining the intention of the Legislature, and, it seems to me to be so plainly in conflict with well-established principles of interpretation, that I hesitate to follow it. I hesitate also, because, A close scrutiny of the words of the act neither requires, nor, as I think, permits it. Such a construction necessarily assumes that the words "such creditor," who shall not be allowed to prove his debt, are identical in their application with the words, "the person," in the same sentence, from whom the recovery was had. There is no such identity, because "the person" may be one who has colluded with the bankrupt in making a "disposition of his property to defeat or delay the operation of the act," and not be a creditor at all. It is a more literal, and, therefore, perhaps, more likely to be the true interpretation, to refer the words,

"such creditor" back for their antecedent to where the word "creditor" previously occurs, as the object of the bankrupts' intent to give a preference. A "creditor" is also a "person," and therefore the imputation of reasonable cause to believe a fraud upon the act is intended, is a necessity to justify a recovery predicated of both. But "person" will not include "creditor," and, therefore, the party who is forbidden to prove his debt is not identical with the "person" against whom a recovery may be had.

There is, however, a much more satisfactory reason, for rejecting the construction approved in the Montgomery case than can be derived from such verbal criticisms. I suppose that there is no sounder rule for the interpretation of statutes, none entitled to a more controlling influence, than that all parts of an act must be construed to effectuate its main purpose. A bankrupt is one who is unable, or who wilfully refuses to pay his debts in full. The main purpose of a bankrupt act is to take the bankrupts' property into the custody of the law, and distribute it equally, in just proportions, among all his creditors. Preferences are the conspicuous frauds in the sense of a bankrupt system, which the law aims to suppress; and just so far as it fails in this, it falls to justify its existence, while, on the contrary, so far as it accomplishes this object, it commends itself to all fair-minded men, and contributes essentially to promote the business interests of the community. But creditors are quite as zealous in seeking preferences, quite as urgent in demanding them, as debtors are to offer or to yield them; and the law which aims to prevent them must apply its restraints upon both. There is, indeed, greater reason for applying these restraints to creditors, than there is to debtors. The motives which actuate debtors to give preferences are, almost always, more excusable than those which, under a uniform bankrupt system, induce creditors to demand them; and it is unjust to visit upon an embarrassed debtor the penalty for giving a preference, and allow the pressing creditor to escape the penalty *for the participation in the same transaction*, for without the concurrence of both, debtor and creditor, a preference is impossible. The

penalty to the debtor is, the deprivation of his right to a discharge. For him there is no atonement. The penalty he has incurred may be enforced by any creditor. The penalty to the creditor should be, exclusion from participation in the distribution of the bankrupts' estate. This is what I understand to be intended by Sections 35, and 39. The first of these sections provides for the recovery by the assignee from the preferred creditor of the fruits of such preference. The last excludes the creditor from proving his debt. The enforcement of this penalty with the utmost vigor will still leave a much greater measure of severity to be borne by the debtor. But it is to be remembered, also, that unless the petition, for adjudication of the debtor as a bankrupt, is filed within four months of the time when the preference was given, the creditor will be allowed to retain the fruits of his shrewd forecast for his individual interest; and will be, of course, beyond the reach of any penalty the Bankrupt Act can inflict. But if the petition for adjudication shall be filed within the four months, and the act shall be construed as to allow him, by a surrender, to enjoy the right, equally with all other creditors, of proving his debt, it is obvious that the whole reliance for the enforcement of the provisions of the Bankrupt Act, so far as penalties are concerned, must be upon those which are denounced against debtors; creditors will still be at liberty to employ all the arts and power with which their position invests them to secure themselves; assured of complete success, if the short statute of limitations of four months shall run in their favor; and if not, that they "can remove the stain of fraud by surrendering the property and disclaiming all intent to become a party to the bankrupts' fraudulent proceedings;" be admitted to equality with every other creditor, to the same extent as though they had made no attempt to evade the letter and spirit of the Bankrupt Act. I do not think the act ought to receive any such construction; I think that embarrassed debtors are entitled to all the protection against the importunities of their creditors to violate the act, which may fairly be deduced from its provisions. I think that creditors who prescribe to themselves the rule of a careful obedience to

the spirit of the act, are entitled to protection against the unscrupulous activity of those who still deem the "race of diligence" open to them and spare no effort to gain its prizes. I think the interpretation of the Bankrupt Act should, as far as possible, by the application of every fair rule, be such as will vindicate its equity: and that it should not, by a partial construction in favor of one class of the subjects of its jurisdiction—creditors—weaken any of the safeguards upon which reliance must be placed for the enforcement of the policy embodied in its provisions. With these views I cannot think that any creditor within the provisions of Section 39, who has accepted a preference, having reasonable cause to believe a fraud on the act was intended, should be allowed to prove his debt.

All of which is respectfully submitted to the decision of the District Judge; together with the depositions and the papers of the parties to the proceeding before me.

HOVEY K. CLARKE, *Register.*

LONGYEAR, J.—As to the construction of the second clause of Section 23 of the Bankrupt Act. The right to prove claims against a bankrupt's estate is conferred, and the claims which may be proven are defined by Section 19. Section 19 is broad enough to cover a claim like that of Fisher, on account of which a preference had been accepted, and but for Section 23 such claim would undoubtedly be provable under said Section 19. Section 23 operates to suspend the right conferred by Section 19 until the creditor holding such preferred claim shall first have surrendered to the assignee all property, etc., received by him under such preference. When such surrender is made the suspension ceases, and the right conferred by Section 19 revives and is in full force the same as if no such preference had existed. The office of the clause of Section 23 under consideration, is therefore, in the first instance, that of suspension merely, to ripen, however, into absolute prohibition in case of a refusal or neglect to surrender. *In re* Tonkin & Trewartha, 4 N. B. R., 52.

The right, therefore, to prove the claim after a surrender

has been made is not derived from Section 23, but is conferred by Section 19.

As to the construction of the last clause of Section 39, absolutely prohibiting the proof of claims in certain cases. It is a well settled rule that in putting a construction upon any part of a statute, the whole is to be considered, and effect is to be given, if possible, to every clause and section of it; and it is the duty of courts, as far as practicable, so to reconcile the different provisions as to make the whole act consistent and harmonious. Sedg. on Stat. and Const. Law, 238; *Com.* v. *Duane*, 1 Binn., 601; *Com.* v. *Alger*, 7 Cush., 53–89; *Attorney-General ex rel. McKay*, v. *Detroit and Erie Plank Road Company*, 2 Mich., 138.

The position contended for in opposition to the right of Fisher to prove his debt, viz.: That no creditor who has accepted a preference, having reasonable cause to believe a fraud on the act was intended, should be allowed to prove his debt, would render the words "until he shall first have surrendered," etc., in Section 23, inoperative and of no force or effect whatever. It will not do to say that those words of Section 23, above quoted, are to be given effect in voluntary and not in involuntary cases, because that would involve the absurdity of saying that the quality and consequences of the act of the creditor in accepting a preference, having reasonable cause to believe a fraud upon the act was intended, are to be measured and judged of, not by the act itself, but by what the debtor may see fit subsequently to do or omit to do. That is, if the debtor should see fit to go into voluntary bankruptcy, then the creditor may surrender and prove his debt; but on the other hand, if the debtor should see fit to omit going into voluntary bankruptcy, and some of his other creditors, taking advantage of that circumstance, should put him into involuntary bankruptcy, then such preferred creditor may not surrender and prove his debt, no matter how anxious and willing he may be to do so, and this, too, notwithstanding that the vitiating element of the act of accepting a preference, the fraud is the same in the one case as in the other. It must be a strong necessity growing out of

positive and unmistakable provisions of the act, that would induce a court to adopt a construction leading to such unreasonable and inconsistent results. Let us see if that necessity exists, and if a construction of the clause of Section 39, under consideration, cannot be adopted, which will lead to more consistent and harmonious results.

In the matter of Tonkin and Trewartha, above cited, 4 N. B. R., 52, this court held that the "recovery" provided for in the first clause of Section 35, is the alternative of the "surrender" contemplated by the second clause of Section 23; that Sections 35 and 39 must be construed together *in pari materia;* and that, so far as those sections relate to the same class of matters, all the qualifications, conditions, and prohibitions of the one will apply equally to the other.

This view has been recently maintained also by Judge Dillon in the United States Circuit Court in Missouri. *Bean*, assignee, v. *Brookmire et al.*, 4 N. B. R., 196. This court further held in the matter of Tonkin & Trewartha, that the class of cases provided for in the first clause of Section 35 is also provided for in Section 39, and therefore, under the rule stated, the express prohibition contained in the last clause of Section 39 applies equally to Section 35; that the conditional prohibition of Section 23 becomes absolute and perpetual in case of a recovery under the first clause of Section 35, and that so far as that class of cases, viz., unlawful preferences, is concerned, the express prohibition of Section 39 was unnecessary, but that Sections 35 and 39 provide for recovery in other cases than those of preference merely, such as payments, sales made, etc., with a view to prevent the debtor's property from coming to his assignee in bankruptcy; money, goods, etc., obtained by a creditor as an inducement to forbear opposition to the bankrupt's discharge; and assignments, gifts, sales, etc., with intent to delay, defraud, or hinder creditors, to none of which the prohibition of Section 23 will apply. And this court, in view of the above considerations, further held as follows:

"The express prohibition contained in the last clause of Section 39 was inserted there in order to prescribe one general rule,

applicable alike to all cases of recovery of money, or property, paid, conveyed, etc., to creditors, contrary to the Bankrupt Act."

After a thorough and careful reconsideration, I see no grounds for changing, or in any manner qualifying, the above construction of the clauses in question, and although that construction was given in a case somewhat different from the present one, yet it is fully applicable to this case.

The construction above given to the clauses in question, results then as follows:

First. That the right of a preferred creditor to prove his debt is conferred by the Bankrupt Act, independent of the second clause of Section 23, and that the operation of that clause is merely to suspend that right until such creditor shall have surrendered all property, etc., as therein provided.

Second. That upon such surrender being made the right of such creditor to prove his debt revives, and is in full force, the same as if such suspension had never existed. This applies the same whether the proceedings in bankruptcy are voluntary or involuntary.

Third. That the prohibition of the right of a preferred creditor to prove his debt, contained in the last clause of Section 39, applies only in cases where a recovery has been had under Sections 35 and 39; and, that the right to surrender under Section 23 ceases, and the right of such creditor to prove his debt is forever barred after such recovery.

This construction gives to each clause of the act under consideration full force and effect, and makes one consistent and harmonious system of the two. It is entirely consistent, too, with the general purpose and scope of the Bankrupt Act. It says to the creditor who has accepted an unlawful preference, surrender what you have thus unlawfully received, and thereby make the estate whole, as it would have been but for your act, so that no harm shall come to the other creditors on account of it, and you may come in and share with the other creditors; but if you refuse or neglect to do this, what you have so received shall be recovered from you, and you shall be deprived of all benefit or advantage on account of your debt.

In this case, it appearing from the facts certified by the Register that the creditor, Jeremiah Fisher, has surrendered to the assignee all property, etc., received by him under his preference, within the meaning of Section 23 of the Bankrupt Act, he may prove his debt against the said bankrupt's estate

UNITED STATES DISTRICT COURT—VERMONT.

A person is held to be insolvent when he is unable to discharge his debts in the usual course of business of persons engaged in the same trade or occupation; hence, where creditors have accounts overdue seven or eight months, and finally have to resort to legal measures for the collection of them, they must be considered as having reasonable cause to believe their debtor insolvent, and money received under these circumstances must be paid to the debtor's assignee in bankruptcy, together with interest and costs of the proceedings instituted by said assignee for the recovery of the money.

STRANAHAN, *Assignee of* BANNISTER, *v.* GREGORY & Co.

THIS is a petition in favor of Stranahan, assignee of Mark Bannister, bankrupt, praying that the defendants, Gregory & Co., be adjudged to pay to said assignee two hundred dollars, alleged to have been paid to Gregory & Co. by the bankrupt, in fraud of the Bankrupt Law.

Defendants' plea denies that they had any knowledge of the insolvency of the bankrupt, or that they had any reason to suppose that he was insolvent when the money was paid.

It appeared from the evidence that Bannister, the bankrupt, had been for some years a small trader in Richford, in the northern part of Vermont. That he has been in the habit of buying goods of Gregory & Co., at Bennington, for two or three years.

That the bills he made were payable in cash or on demand, and that for some time he paid them when presented; that some seven or eight months before the 15th of November, 1869, a balance had accrued against him of some two or three hundred dollars, and that Gregory & Co. repeatedly called

upon him for the amount due, which he did not pay, but put them off by saying that he would as soon as he could.

That in October, 1868, the custom-house officers seized at St. Albans, some ten hundred dollars' worth of butter belonging to Bannister, as smuggled property, which Bannister bonded and took back into his possession.

That in November, 1868, the government prosecuted him for the penalty, about two thousand dollars, double the value of the butter seized, and attached all his real estate, and that both prosecutions are still pending in the court, which Miner, one of the defendants, well knew, Bannister having talked with him about it.

It further appeared that Bannister had been for some eighteen months previous to the 15th of November, 1869, owing one Rublee, a trader in St. Albans, about twelve hundred dollars. That the demand was left with one Powell, an attorney in Richford, for him to collect as fast as he could.

That Bannister had for some time been in the habit of paying Powell small sums of money, and turning out to him small demands against his (Bannister's) customers, to be collected and applied upon the Rublee debt, so that by the 1st of November, 1869, the debt had been reduced to some one or two hundred dollars.

That about the 1st of November, 1869, Mr. Miner, one of the firm of Gregory & Co., procured a writ of attachment in their favor against Bannister, and with it went up to Richford for the purpose of securing their debt. That he went to Mr. Powell, the attorney aforesaid, for his advice in relation thereto. That upon consultation Powell advised him, that in consideration of the Bankrupt Law, he had better not attach, but to get security or payment some other way if he could. Powell told him about the Rublee debt, and how he had been collecting it.

That thereupon Miner went to see Bannister; that Bannister paid him fifty dollars in money, and gave him an order for fifty dollars on a responsible person in Burlington, and Miner sold him a small bill of goods—twenty-five or thirty dollars' worth. That Miner then went back to Powell, told

him what he had done with Bannister, and said that he would leave the writ with him (Powell), to be used if he thought advisable. That Miner came back to Burlington and presented the order, which the drawer refused to pay or accept, saying that he owed Bannister nothing. Miner at once wrote back to Powell that if Bannister did not immediately pay or otherwise secure the debt, to have the attachment served. When Powell received the letter he went to Bannister and informed him what he was directed to do. Bannister then paid the debt, partly in money and partly in demands against other persons, which Powell collected, and in a few days transmitted the amount, two hundred and six dollars, to Gregory & Co., at Burlington.

It further appeared that all of Bannister's property, real and personal, amounted to about two thousand dollars in value; his only interest in real estate consisted of a bond for a deed of a house and lot in Richford.

On the 15th day of February, 1870, the creditors of Bannister petitioned to have him declared a bankrupt, and such proceedings were had thereon, that, on the 5th day of April, 1870, he was so adjudged; and on the 27th day of April, Stranahan was duly appointed assignee. It appeared that Bannister absconded the 1st day of February, 1870, and has never returned.

It further appeared that there had been no material change in his property or pecuniary condition, from the 1st of November, 1869, to the 15th of February, 1870.

It further appeared that on the 15th day of February, 1870, Bannister was owing five thousand eight hundred dollars in addition to the claims which the government was prosecuting against him, and that his assets of every description were less than two thousand dollars. It was admitted that a demand was made of Gregory & Co., by the assignee, for the repayment of the money before the filing of this petition.

SMALLEY, J.—The evidence in this case shows clearly that Bannister, the bankrupt, was largely insolvent when he made the payment to Gregory & Co. That is not denied by the de-

fendants, but they maintain that they had no knowledge of such insolvency, nor "reasonable cause to believe him to be insolvent."

Miner, one of the defendants, testified that he did not know him to be insolvent, and did not suppose him to be so; and Gregory, the other defendant, does not seem to have known much about Bannister or his business in any way.

The question then is, did Miner, from this evidence, have reasonable cause to believe Bannister to be insolvent when he forced the payment of this money?

What is the meaning of the word insolvent, as used in the Bankrupt Law?

It has often been defined by judges in different sections of the Union. I have never known or heard of more than one definition upon that question. The courts seem to have been much more unanimous upon that, than some other clauses of the Bankrupt Law. A person is held to be insolvent, when he is unable to discharge his debts in the usual course of business of persons engaged in the same trade or occupation.

This rule has been repeatedly laid down by this court, and I see no reason to change it. Apply that rule to this case. Bannister had been trading with Gregory & Co. some two or three years, and finally run behindhand between two and three hundred dollars, which had been overdue some seven or eight months. They had repeatedly called upon Bannister for payment, but unsuccessfully.

They finally procured a writ of attachment, and went to Richford to get pay or security; went to an attorney there; consulted with him; were told that the attorney had been over a year collecting a debt of about twelve hundred dollars against Bannister; that he had received it in small sums at different times, partly in money and partly in demands turned out to him (Bannister) against his customers. The attorney advised Miner not to attach. The reason is obvious. It might put Bannister into bankruptcy. Miner then went to Bannister, who gave him fifty dollars in money, and an order for fifty dollars more. Miner came home, leaving the writ with the attorney;

presents the order; payment is refused; he then writes to the attorney to have the attachment served. The attorney thereupon goes to Bannister, who pays him Gregory & Co.'s debt, partly in money and partly in demands, and after collecting the demands he, pays the proceeds them over to defendants.

It should be borne in mind, that Miner was before this fully informed of the government prosecutions against Bannister and his property.

These facts in relation to Miner's knowledge are not disputed. Did they not, therefore, furnish Miner, in the language of the law, *reasonable cause to believe him* (Bannister) *to be insolvent*, within the meaning of the Bankrupt Law?

Without multiplying words, I think it very clear that they did. I cannot doubt it.

It is therefore ordered and adjudged that Gregory & Co. pay to the assignee the sum paid them by Bannister on the 15th day of November, 1869, with interest, and the cost of this proceeding.

Dewey, Noble and *Smith*, for petitioner.

L. R. Englesby, for petitionees.

COMMON PLEAS—BERKS CO., PENNSYLVANIA.

A payment by a debtor who is in insolvent circumstances more than four months before the filing of the petition by or against him, although made to the creditor by way of preference, will be sustained against the assignee under the provision of the first clause of the 35th Section of the Bankrupt Act of 1867. Hence, where this state of facts exists in an action brought by the assignee in bankruptcy to recover money thus paid, judgment must be rendered for the defendant.

MAURER, *Assignee of* A. FRANTZ *v.* E. FRANTZ.

WOODWARD, J.—There is but a single significant question in this case. That an action like this is within the jurisdiction of the State courts is shown by Rohrer's Appeal, 12 P. F. Smith, 498. The same case proves that acts of bankruptcy committed

between the date of the passage of the Bankrupt Act and the 1st of June, 1867, are within the purview, and subject to the operation of that law. Pavitt, the bankrupt, confessed judgments on the 1st of May, 1867; on the 12th of June, other creditors petitioned to have him declared a bankrupt. On the 8th of August, a jury of the United States Court found that the judgments were in fraud of the Bankrupt Law, and he was adjudged a bankrupt. On the 12th of July, an auditor of the Common Pleas awarded the money made on executions under the judgments to the plaintiffs in them. The assignees in bankruptcy (before the report of the auditor was confirmed absolutely, but after the time allowed by the rules of court to file exceptions and ask an issue) asked leave to file exceptions, and that the court would direct an issue to try whether the judgments were not fraudulent. The applications were refused, and this was held by the Supreme Court to be error.

The material point in the present controversy arises upon the construction that ought properly to be given to the 35th and 39th Sections of the Bankrupt Act. The acts of the bankrupt complained of were within the terms of the first clause of the 35th Section; and for those acts it was required by that clause that, in order to entitle the assignee to recover the fund, the bankrupt's petition should be filed within four months from the time of their commission. In this instance the interval was less than six months, but more than four; and it is insisted on behalf of the defendant, that the condition which authorized a recovery by the assignee does not in consequence exist. On the part of the plaintiff the ground is taken that the same acts which were prescribed against in the 35th Section, were made causes of bankruptcy also by the 39th; that the person committing such acts was subject to be adjudged a bankrupt by the latter section, "provided the petition should be brought within six months after the act of bankruptcy should have been committed;" and that the legitimate construction of the whole law requires that the concluding provisions of the 39th Section should be taken as establishing the six months, allowed for the petition for the decree, to be the limit to which the right of the

assignee to recover the fund fraudulently transferred should be extended.

To adopt the construction of the plaintiff's counsel upon this embarrassing and doubtful question, would be, substantially, to strike the 35th Section from the Bankrupt Act. It seems impossible to give it any effect, unless, that effect is attributed to it, for which the defendant's counsel contends. There has been constant conflict of decision on the point in the Circuit and District Courts of the United States; and the controversy will only end with an authoritative decision of the Supreme Court or with the explanatory act of Congress. In the meantime it is the clear duty of this court so to treat the law as to give force to all its parts, and that can only be done by adopting the construction of the United States Circuit Court of Missouri, in the case of *Bean, Assignee of Kintzing*, v. *Brookmire & Rankin*, 4 N. B. R., 196. The court held that "a payment by a debtor who is in insolvent circumstances, more than four months before the filing of the petition in bankruptcy by or against him, although made to the creditor by way of preference, will be sustained as against the assignee, under the provisions of the first clause of the 35th Section of the Bankrupt Act. The limitations of four and six months in Section 35 are limitations upon payments and conveyances which are otherwise valid under the common or statute laws of the States; but where the payment or conveyance, or other transaction, is fraudulent by any recognized rule of law, the assignee must sue within two years. In a suit by the assignee to recover of a creditor money paid by the bankrupt by way of preference, the declaration must allege that the payment was made within four months before the filing of the petition in bankruptcy, or it will be bad on demurrer." The case further decided that "the first subdivision of Section 35 of the Bankrupt Act, with its limitation of four months, applies only to cases of payments or conveyances made to a creditor in consideration of pre-existing debts by way of preference, while the second subdivision applies to other transfers and conveyances made contrary to, or in fraud of, the provisions and policy of the Bankrupt Act; and

that the provisions of Section 39, avoiding certain acts, are subject to the limitations of four and six months contained in Section 35." The case stated shows that Elias Frantz was a creditor of the bankrupt, when the judgment complained of was confessed, and that the petition in bankruptcy was presented more than four months afterwards. Assuming the exposition of the statute by the Circuit Court of Missouri to be accurate, the defendant's right to retain this fund is clear. Judgment is entered for the defendant.

UNITED STATES DISTRICT COURT—WISCONSIN.

The District Court will not take jurisdiction in bankruptcy on the petition of an only creditor, whose debt is secured by virtue of a judgment which is the only lien on real estate.

Such creditor seeking to set aside a fraudulent conveyance, must follow his remedy by bill in the State court.

A conveyance, even though fraudulent, is not made "in contemplation of bankruptcy or insolvency," there being no other creditors, and this debt being secured.

There is nothing to bring such a case within the scope or intent of the act.

In re JOHANN.

MILLER, J.—On the 15th day of September, 1856, Nicholas Johann made his note to the Milwaukee and Lake Superior Railroad Company, payable on the 1st day of July, 1866, with his mortgage on a tract of land as security. The petitioner having become the assignee of the note and mortgage, on the 26th day of September, 1866, instituted proceedings in a court of this State to foreclose the mortgage. In the month of December following, a judgment for the sale of the mortgaged premises was rendered, with an order for execution for the residue of the debt against other property of the debtor. The mortgaged premises being encumbered with taxes and tax titles, the proceeds of sale were inconsiderable, when the amount of the residue of the debt was certified and transferred to the judgment rendered pursuant to a law of the State. The petition in bankruptcy is founded on this judgment. It represents,

as the act of bankruptcy, that on the 15th day of October, 1868, Nicholas Johann, the debtor, fraudulently conveyed to his two sons, all his estates, lands, and tenements, describing them, with intent to hinder and delay this petitioner in the collection of his said debt. The conveyances were exhibited at the hearing. The debtor claims no property except such, as is embraced within the exemption laws of the State. No other debt was alleged or proven. The real estate conveyed to the two sons is of greater value than the amount of this debt. Johann is a farmer, and not engaged in trade.

There is no doubt but a conveyance by a father to his sons, in consideration of his support, is fraudulent as to his creditors; and would be a cause of bankruptcy at the instance of creditors, other than this petitioner. The objects of the Bankrupt Act, are discharge of a debtor from his debts, and an equal distribution of his estate among his creditors, in proportion to the amount of their respective debts. This case is not within the scope or intent of the act. There are no creditors to claim distribution of assets. Nor does any creditor allege as cause of bankruptcy these conveyances, but the petitioner, who can enforce the collection of his debt by proceeding in equity, in the court where his judgment remains of record. A single creditor, whose debt is secured by a lien on bonds of a greater value than the amount of his debt, cannot be permitted to abandon all remedies open to him for the collection of his debt, and claim the jurisdiction of this court in bankruptcy for the purpose. A judgment creditor cannot claim the jurisdiction of the court in bankruptcy for the collection of his debt, fully secured by the only lien on real estate.

It cannot be adjudged that Johann made the conveyances to his sons in contemplation of bankruptcy or insolvency; nor can I find him to be in a state of insolvency, while it appears there is property sufficient for the full payment of his only debt, upon the removal of a cloud on the title.

The deeds having been given by the debtor during the pendency of the suit of this petitioner against him, should be declared fraudulent, if no legal or equitable consideration be

shown in the proper tribunal. Such a decree cannot be denied upon this petition in bankruptcy. If a question of this character should arise at the instance of an assignee in bankruptcy, I would require him to bring his bill to equity. *Shawhan* v. *Wherritt*, 7 How., 27.

For these reasons I order the petition dismissed, but without prejudice to proceedings on the judgment.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Relationship in the ninth or less degree on the part of a proposed trustee, to a bankrupt or to a creditor, even the largest in amount, of a bankrupt, or to a proposed member of the committee, or on the part of a proposed member of the committee, to such creditor, or to the bankrupt, cannot be regarded as a disqualification. Other facts may concur with relationship which would make confirmation improper. Where three-fourths in value of the creditors who have proved their debts designate the trustee and the committee, and it does not appear that they are acting in the interest of the bankrupt, their choice will be sustained. The claim of any creditor may be investigated under Section 22, and examination of any person had under Section 26, notwithstanding the appointment of a trustee, and the assignment of the estate to him.

In re Zinn *et al.*

Blatchford, J.—In this case, at the first meeting of creditors, eight creditors who had proved their claims, and whose claims amounted in the aggregate to three hundred and thirty-two thousand seven hundred and twelve dollars and sixty-eight cents, and to three-fourths in value of the aggregate amount of all the claims proved, subscribed under Section 43 of the act a resolution that it was for the interest of the general body of the creditors of the bankrupts that the estate of the bankrupts should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, and nominating John H. Wyman as trustee, and Samuel Wyman, Jr., Henry Almy, and George C. F. Seaman, as the committee. Among the eight creditors are Herman D. Aldrich, to the amount of one hundred and eighty-eight thousand eight hundred and sixty-six dollars and

eighty-eight cents, who signs by the said Samuel Wyman, Jr., as his attorney; the said Samuel Wyman, Jr., to the amount of fourteen thousand nine hundred and eighty-five dollars and thirty-six cents; the said George C. F. Seaman, to the amount of sixty-four thousand nine hundred and forty-two dollars and forty-five cents; and the firm of which the said Henry Almy is a member, to the amount of four thousand five hundred dollars.

The said Herman D. Aldrich is the uncle of two of the bankrupts. The wife of the said Herman D. Aldrich is the cousin of the said John H. Wyman, and the sister of the said Samuel Wyman, Jr. The said Herman D. Aldrich is now in a lunatic asylum, as a patient, for his health, but has not been adjudged a lunatic by any legal proceedings, nor has any committee of his person or estate been appointed. The said Samuel Wyman, Jr., acted as the attorney for the said Herman D. Aldrich in proving the said claim of the said Herman D. Aldrich, and in voting for said resolution, in pursuance of a power of attorney executed by said Herman D. Aldrich in January, 1870, when he was of sound mind.

John H. Wyman, the proposed trustee, is therefore related by consanguinity and affinity, in the fifth degree, to Herman D. Aldrich, and in the ninth degree to the two bankrupts, who are the nephews of Herman D. Aldrich. Samuel Wyman, Jr., is related by consanguinity and affinity, in the third degree, to Herman D. Aldrich, and in the seventh degree, to the two bankrupts, who are the nephews of Herman D. Aldrich, and in the fourth degree, to John H. Wyman.

A creditor who has proved his debt, and who did not vote for or sign the resolution, objects to its confirmation by the court, on the ground of the relationships and the other facts thus stated.

The mere fact of relationship in the ninth degree, or a less degree, on the part of a proposed trustee, to a bankrupt or to a creditor, even the largest in amount, of a bankrupt, or to a proposed member of the committee, or on the part of a proposed member of the committee, to such creditor, or to the bankrupt, cannot be regarded as a disqualification.

Other facts, indeed, may concur with such relationships, to make a confirmation improper. But, in the present case, there are no such facts. The three persons named as the members of the committee are all of them creditors, the aggregate of their claims being more than eighty-four thousand dollars. Samuel Wyman, Jr., is the attorney of the largest single creditor. The theory of the provisions of the 43d Section is, that three-fourths in value of the creditors who have proved their debts, shall designate the trustee and the committee. The persons designated in the present case are gentlemen of high character and standing, free from all reproach. Nothing appears to indicate that they will act in the interest of the bankrupts at the expense of the creditors. John H. Wyman and Samuel Wyman, Jr., are more nearly related to the principal creditor than they are to the bankrupts. The trustee is required, by the 43d Section, to wind up and settle the estate for the equal benefit of all the creditors, and is, at all times, subject to the direction of the court in executing his trust. There is nothing to warrant the suggestion that the bankrupts procured the creditors to make these appointments, or that they are made in the interest of the bankrupts as against the creditors.

Mr. Seaman, although a resident of New Jersey, has a place of business in the city of New York, which he frequents daily.

The questions raised in regard to the power of attorney from Herman D. Aldrich to Samuel Wyman, Jr., and to the insanity of Herman D. Aldrich, I do not consider, for the reason that if the claim of Herman D. Aldrich be stricken out from the signatures to the resolution, it must likewise be stricken out from the debts proved, and there would thus still be signatures to the resolution of creditors to three-fourths in value of the debts proved. Notwithstanding the appointment of a trustee and the assignment of the estate to him, the claim of any creditor may be investigated under Section 22, and the bankrupt and other persons may be examined under Section 26.

The resolution passed by the creditors will be confirmed when the Register shall have signed the proper certificate under Form No. 63.

J. L. L. Cummins, for the resolution.

A. C. Fransioli, for the opposing creditor.

UNITED STATES CIRCUIT COURT—W. D. PENNSYLVANIA.

When a debtor confessed a judgment within four months previous to the filing of the petition against him, being at the time insolvent, and the creditor having reason to believe him so, though there was, as a consideration, a pre-existing debt: *Held*, to be in fraud of the Bankrupt Act, being in the category of acts prohibited in Section 35.

The fact that the judgment was taken as a collateral for the security, aggregate of several other judgments, regular and valid, and to facilitate their collection, does not affect their validity.

When one constituted attorney for the collection of a debt procured from the debtor a judgment note for the amount in his own name, and entered it, knowing that the debtor was insolvent, there being a clear intent to give a preference within the meaning of the act, though the fact of insolvency was not directly known to the real creditors, such knowledge is imputable to them and the judgment is invalid.

But where the note and warrant of attorney on which a judgment was founded, were given within four months before proceedings in bankruptcy, being the agreed security for a loan made at the time, and it conclusively appeared that the creditor had no reasonable cause to believe the debtor to be insolvent, though he knew him to be so at the time of entering the judgment, the judgment is valid.

Where the debtors confided to one of their creditors the secret of their embarrassment and insolvency, for the purpose of protecting their surety, and better securing the collection of the debts by the prompt seizure of their property in execution, and the creditor in consequence of this information immediately issued execution: *Held*, to fall within the provisions of the 35th Section of the Bankrupt Act, and that the assignee was entitled to the property, or to the value of it.

VOGLE, *Assignee*, *v.* LATHROP.

M'KENNAN, J.—On the 24th of February, 1868, the plaintiff was duly appointed assignee of L. C. & M. Berry, who were adjudged bankrupts by the District Court for the Western District of Pennsylvania, on the petition of their creditors. He has filed his bill in this court, praying that the defendant may be enjoined against proceeding upon certain judgments, held by him against the bankrupts, in Luzerne county, Pennsylvania,

and that the property seized upon execution issued thereon may be delivered up to him; and the case has been heard on the bill and answer.

The bill alleges, that the defendant is the owner of judgments entered upon warrants of attorney, to Nos. 61, April Term, 1866; 301, January Term, 1867; 302, April Term, 1867, and 113, 173, and 174, January Term, 1868; that he has caused executions to be issued thereon, and the stock in trade, as well as certain real estate of the bankrupts, to be seized and advertised for sale; that at the time said warrants were given, the notes accompanying them did not evidence the true amount of the indebtedness of the makers; that such indebtedness, if any existed, had been fully paid to the defendant; and that when said notes were executed, the defendant knew, or believed, or had some reason to know, or believe, or expect, that the said L. C. & M. Berry were in embarrassed circumstances, and were about to become bankrupt.

All these obligations affecting the integrity of the defendant's judgments, are denied by the answer; and, as the plaintiff has not contested such denial, by any replication, its truth is to be taken as admitted, and the denied allegations as entirely unsustained. These judgments are to be treated, then, as free from the vice of inadequate or dishonest consideration, and as not subject to impeachment for any of the reasons above stated.

The bill further alleges, that judgments in Nos. 113, 173, and 174, January Term, 1868, "were given when they, the said L. C. & M. Berry, were insolvent, or contemplated insolvency, and that the intent was to give a preference, or to defeat or delay the operation of the Bankrupt Law, of which the said D. N. Lathrop had full knowledge."

The object of the Bankrupt Act is to prevent all preferences by insolvent debtors, and to secure an equal distribution of their property among their creditors. By the 35th Section of the act, it is enacted, that a preference by an insolvent debtor, in any of the modes enumerated, within four months after the filing of a petition by or against him, to any creditor having

reasonable cause to believe such debtor to be insolvent, shall be void, and property acquired by means of such preference, or the value of it, may be recovered by the assignee in bankruptcy from the person receiving it, or to be benefited by it. Under this section, it has been repeatedly adjudged, that these elements must co-exist in the transaction from which a preference results, viz.: an intention to give a preference, the insolvency of the debtor at the time, that the creditor had reasonable cause to believe that such insolvency existed, and that such preference was given in fraud of the provisions of the Bankrupt Act.

The confession of a judgment for a pre-existing debt, when the defendant is insolvent and the plaintiff has reasonable cause to believe it, is in the prohibited category, because, as a preference necessarily results from such confession, it is conclusively presumed that both parties intended such advantage to the creditor, and, therefore, to defeat the operation and effect of the act. A security, however, given for a consideration passing at the time, is not subject to such presumption, and is not, *prima facie*, invalid. Certainly, a judgment entered more than four months before proceedings in bankruptcy, on an attorney's warrant, executed concurrently with a loan of the sum represented by it, is free from all taint of illegality.

On the 17th of December, 1867, proceedings were commenced against L. C. & M. Berry, under the involuntary provisions of the Bankrupt Law. On the 23d of November previous, the respondent was informed by one of them that they were insolvent, and thereupon obtained from them the confession of judgment, No. 113, January Term, 1868, for four thousand four hundred and sixty-six dollars and eleven cents. This sum is the aggregate of the judgments and judgment notes above stated, and was taken to protect the security therein, to save costs, and better to secure the collection of said judgments, but with the distinct agreement that it was a mere auxiliary security. Under these circumstances the respondent very properly, on the 10th December, 1867, executed a full release of the judgment, which was afterwards entered on record. As by his

own act, therefore, it has been annulled, it is unnecessary to deal further with it in this case.

On the 26th December, 1867, the respondent procured from the Berrys a judgment note, in his own name, for six hundred and twenty-five dollars and thirty-seven cents, dated October 21, 1867, and entered it to No. 173, January Term, 1868. This was really for a debt due to Geo. W. Brainerd & Co., which was in the charge of the respondent, as their attorney, for collection, and was so taken at their special instance and request. At the time the respondent had information of the insolvency of the debtors, and there was a clear intention to give the debt a preference within the meaning of the Bankrupt Law. That the fact of insolvency was not directly known to the real creditors, will not rescue the transaction from the operation of the law. Such knowledge is imputable to them, because it had been communicated to their constituted representative, who stood, in all the legal relations of the transaction, precisely in their stead. This judgment, must, therefore, be held to be invalid.

Judgment No. 174, January Term, 1868, stands upon a different footing. Although the note and warrant of attorney, on which it was founded, were given within four months before the proceedings in bankruptcy, they were the agreed security for a loan made at the time, and it conclusively appears that the respondent then had no reasonable cause to believe the defendants to be insolvent; this knowledge was first obtained on the 23d of November following. True it is, that the judgment was not entered on record until the 30th of November, when the respondent knew that his debtors were insolvent, and that there is some conflict of opinion among the judges of the District Courts as to the validity of a judgment entered under such circumstances. Can it be predicated of this state of facts that the warrant of attorney was executed with a view to give a forbidden preference, or that the creditor had reasonable cause to believe it to be in "fraud of the provisions of the Bankrupt Law?" I think clearly not; and I am unconvinced by any argument, that it is a sound construction of

the Bankrupt Act to hold that a security free from any infirmity when it was made, was "given" in fraud of its provisions, or to defeat or delay its operation, because a subsequent exigency may have prompted the creditor to avail himself of the means of saving his debt, which the law authorizes him to stipulate for as an essential part of his contract. I would hesitate long to adopt such a construction when it would be followed by the anomalous consequence of a forfeiture of his security, by a creditor who was without fault. I cannot, therefore, adjudge this judgment to be void.

All the other enumerated judgments were confessed and entered, either before the Bankrupt Act, or before June 1, 1867, when it went into complete effect. Their validity has not been successfully sustained.

It was urged in argument, however, that the confession of judgment No. 112, January Term, 1868, embodying the amount of these judgments as it did, under the circumstances stated in the answer, implants in them the fatal effects of that judgment. The argument is not sound, for the reason that the 35th Section of the Bankrupt Law abrogates only the instrumentality by which a preference is sought to be obtained, and all interest or advantage acquired by its use. As soon as the respondent's attention was called to the questionable validity of that judgment, he promptly recalled the execution issued upon it, and before the filing of this bill, he annulled it by a release of record. Certainly he derived no advantage from it, and as it was merely an auxiliary security, he has himself dealt with it as exhaustively as this court could do.

As before stated, these judgments, when they were taken, were free from any inherent element of illegality. They were entered of record, and the real estate of the defendants thereby became bound as a security for the payment. Entrenched in the laws of the State, these liens held the strongest position, and are entitled to like protection with every essential constituent of the contract out of which they sprung; they are expressly respected by the Bankrupt Act. Is it then a rightful, or intended, construction of the 35th Section of the act to

hold, that it declares to be absolutely void a judgment unimpeachable on any ground when it was "*given*," thereby working a dissolution of its lien, because of a subsequent abandoned and fruitless arrangement to facilitate its collection? In my apprehension such a construction is unwarranted either by the terms of the section or the spirit and object of this law. So far, then, as the lien of the judgments upon real estate is involved, they must be treated as valid.

Another question remains, which, although it is not raised by any direct allegation in the bill, may perhaps be regarded as presented with sufficient distinctness in the bill and answer to call upon the court to consider it. It involves the right of the respondent to hold a lien on the personal property seized under the executions issued on his judgments. By the 39th Section of the Bankrupt Act, where any person, being bankrupt or insolvent, procures or suffers his property to be taken on legal process, with intent to give a preference to his creditor, or with intent to defeat or delay the operation of the act, and shall be adjudged a bankrupt, his assignee may recover back the property so taken, if the person receiving it had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent. Passive acquiescence in the seizure of his property in execution by an insolvent debtor, when he could prevent it by going into voluntary bankruptcy, has been held to be suffering it to be taken with intent to give a preference, within the meaning of this section. *In re* Black and Secor, 1 N. B. R., 353; *in re* Craft, 2 N. B. R., 21; *in re* Sutherland, 1 N. B. R., 531. But the facts here import more than inactive submission, if they do not amount to positive procurement on the part of the debtors. They confided to the respondent the secret of their embarrassments and insolvency, and thereupon gave him a judgment for the amount of other judgment indebtedness to him—several installments of which were not then payable—for the very purpose of protecting their surety and better securing the collection of the debts, by a prompt seizure of their property in execution. While this plan was abandoned by the respondent, upon his conceiving

doubts of its efficiency, he immediately issued executions upon some of his other judgments, and caused them to be levied upon the personal property of the defendants. Is there any room for doubt, then, that the debtors were moved by an intent to prefer the respondent's debt, and that the respondent was prompted by the debtor's information to seek a preference by an exclusive appropriation of their personal property to his judgments? Such is the clear significance of all the circumstances. But, as the assignee might recover back the property seized, if it had been sold, the respondent cannot maintain the advantage thus apparently gained, and the property or its equivalent must go to the assignee.

DECREE.

This cause came on to be heard upon the bill and answer, and was argued by counsel; and thereupon, in consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: that the judgment entered to No. 173 of January Term, 1868, in the Common Pleas of Luzerne county, Penn., in the name of D. N. Lathrop, but for the benefit of George W. Brainerd & Co., against Leman C. Berry and Marion Berry, is void under the 35th Section of an Act of Congress, entitled "An Act to establish an uniform system of bankruptcy throughout the United States;" and that a perpetual injunction be granted to restrain the legal and equitable owners thereof, their agents or attorneys, from enforcing the same by execution; that judgments in the same court, entered to Nos. 61, of April Term, 1866; 301, of January Term, 1867; 302, of April Term, 1867: and 174, January Term, 1868, are not void, by reason of any of the matters in the complainant's bill of complaint alleged against them; and that the fund in the custody of the complainant, produced by the sale of the property of said L. C. & M. Berry, under the interlocutory order of this court, so far as the same accrued from the sale of real estate, be applied by said complainant, first, to the payment of the expenses of said sale of real estate and the costs of this suit, and second, to the judgments last above stated, in the order of their

priority; and that the remainder of said fund, arising from the sale of personal property, be retained by said complainant, as assets in bankruptcy of said Leman C. and Marion Berry; and that either party may apply to this court hereafter, if necessary, touching the proper enforcement of this decree.

SUPREME COURT—PENNSYLVANIA.

The property of a bankrupt vests in his assignee as of the date of the commencement of proceedings, and no payment by or to him (the bankrupt) subsequent to that date is valid, even though made or received *bona fide* or without notice. The earnings and acquisitions of the bankrupt subsequent to the commencement of proceedings in bankruptcy, belong to him; liable, however, to execution or attachment by his former creditors, if he fails to receive his discharge.

MAYS *v.* THE MANUFACTURERS' NATIONAL BANK OF PHILADELPHIA.

SHARSWOOD, J.—The counsel for the parties, with all their learning and research, have not been able to produce any decision upon the question, whether when the debtor of a bankrupt, in good faith and without knowledge or notice of the proceedings against him, pays him a debt, he can be compelled to pay it over again to the assignee? The reason may be, that the language of all bankrupt laws, previous to the Act of Congress of March 2d, 1857, was such as to preclude the question from arising. In England, by the statute 13 Eliz., C. 7, the property of the bankrupt, vested in the commissioners from the time of an act of bankruptcy committed, and payments made by a debtor to a bankrupt, after a secret act of bankruptcy, would, under the statute, have been void. The injustice of this relation back was so apparent that Parliament, by the statute of 1, Jac. C. 14, made such payments, until notice of the act of bankruptcy, good; but still left payments after commission issued, as they stood under the statute of Elizabeth. To the present time the law in England rests on the same basis, that all contracts, conveyances, and dealings to

and with a bankrupt in good faith, and without notice before the filing of the petition, are valid; otherwise, after the filing. Eden on Bankruptcy, 258, stat. 4, Geo. IV., C. 16; 12 and 13 Vict., C. 106. By the Act of Congress of April 4, 1800, Section 13 (1 Story's Laws, 737), the commissioners were empowered to assign all the debts due to the bankrupt, which assignment should vest the property and right thereof in the assignee. "Provided, that when a debtor shall have *bona fide* paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees." This just and liberal provision was not contained in the Act of Congress of August 19, 1841; 5 Story's Laws, 2859; but it declared, "that all dealings and transactions by and with any bankrupt, *bona fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act. Provided, that the other party to any such dealings and transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." The Act of Congress of March 2d, 1867, has no express provision on the subject. The case is necessarily left to the legal effect of the assignment provided by the act. The 14th Section enacts "that as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the Register, shall by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy; and thereupon, by operation of law, the title of all such property and estate, both real and personal, shall vest in said assignee." The only and natural construction of these words is, that the assignment, no matter when made, shall take effect by operation of law, as if it had been made at the commencement of the proceedings, or on the day of filing the petition. It is undoubtedly well settled that of such an assignment by operation of law, the whole world is bound to take notice. *Hitchcock* v. *Sedgwick*, 2 Vernon, 156, where it

was said that there was a difference where a man had divested himself of his estate by his own act, and where it was taken out of him by Act of Parliament, whereunto all persons are supposed to be parties, and are concluded by it. *Collet* v. *De Gols*, Cas. Temp., Talbot, 65. The same principle was applied by this court to the case of an insolvent debtor, under the Act of March 26th, 1814; 6 Smith's Laws, 195; which provided that "the trustee or trustees shall be deemed vested with all the estate of such debtor at the time of his or their appointment." "This divestment of his debt," said Duncan, J., in *Wickersham* v. *Nicholson*, 14 S. &. R., 118, "was by positive law, and the assignment, a notorious judicial act, of which all the world was bound to take notice. It is constructive legal notice, and as binding to every intent as actual notice to the individual." It was accordingly decided in that case, that a payment to the insolvent the day after his assignment and discharge, by one who had not actual notice of it, was not valid. We are compelled to apply this same principle to the case of a payment to a bankrupt *bona fide* made, and without actual notice after the commencement of the proceedings, namely, the filing of the petition, to which time, by the express provision of the Act of Congress, the assignment relates.

It must be admitted that this is an unjust and cruel law, and the effect of it may be to make bankrupts of honest and solvent men, who are only desirous of fulfilling their legal obligations. That all the world has notice of a transfer by operation of law, in proceedings in bankruptcy, is a mere fiction—not true in reality—whatever care the law may take to give public notice through newspapers. All men cannot afford to take all the newspapers, and if they did, have not time to read all the advertisements. Life is too short, and other cares too pressing for that. The attention of Congress ought surely to be called to this subject, and some suitable provision made to protect those who deal honestly, in good faith, and without notice, with bankrupts.

There is, however, another important question which arises on this record. The proceedings in bankruptcy against August

Born were commenced by filing the petition, January 31st, 1868, and he was adjudicated a bankrupt February 26th, 1868. His bank account with the defendant below, which was all the evidence produced to charge them with the receipt and possession of any of his property, showed a balance from old book under date of February 6th, 1868, and all the deposits made by him were subsequent to that date. Now, if we give the fullest effect to the relation of the assignment to the commencement of the proceedings, it must be held to operate in the same manner as if it had been then made. It follows logically, that it only transfers the property which the bankrupt then had. Of course we do not speak of fraudulent conveyances made by him previously. This is not only the literal construction of the act, but accords with its spirit and policy. It is the most humane and liberal interpretation, that the earning and acquisitions of the bankrupt subsequent to the commencement of the proceedings shall be his own, subject to his eventual discharge. If he does not succeed in procuring that, they remain liable to execution or attachment by his former creditors. It is certainly good policy to hold out encouragement to continued effort and industry. Besides, if this is not the date of the transfer, what is? The adjudication or the discharge? A considerable period may elapse between the filing of the petition and either of them. If his acquisitions in the meantime are in any event to pass to his assignee he will be likely to fold his hands inactively, content with the allowance made him by the law. It is true that, by the 16th Section, debts provable are those due at the time of their adjudication, but it is also true that, by the 32d Section, the certificate of discharge is expressed to be "from all debts and claims which, by said act, are made provable against his estate, and which existed on the —— day of ——, on which day the petition for adjudication was filed." It would rather seem to follow that the adjudication was also meant to relate to the day of filing the petition, otherwise it is not easy to reconcile this provision. *In re* Patterson, 1 N.B. R., 125.

Judge Blatchford, in an able and elaborate opinion, adopts

and vindicates this construction of the Act of Congress: "The intent and purport of the provision" (Section 14), says he, "is that the property which was the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and no other property, shall vest in the assignee, and shall rest in him as of the time of the commencement of such proceedings, no matter when the assignment of the assignee is actually executed. It does not mean that the property which is the property of the bankrupt at the time the assignment is executed, and also the property which was his property at the time of the commencement of the proceedings, shall pass to the assignee." He accordingly decided that a bankrupt cannot be examined as to property acquired or business done after the date of filing the petition. And this decision was followed by Judge Field, of New Jersey. *In re* Rosenfield, 1 N. B. R., 319.

There was no evidence adduced in the court to show that the balance in the bank February 6th, 1868, or the subsequent deposits, belonged to August Born, the bankrupt, on the 31st January, 1868—the day the petition was filed. They may have been given to him by friends or bequeathed to him by will, or acquired by his own industry after that date. The *onus* was certainly on the plaintiffs below to show affirmatively that they were his property at the time the assignment by relation took effect. They failed entirely to do this, and there was consequently no evidence for the jury to charge the defendants even with the balance which was found by the verdict. Judgment affirmed.

UNITED STATES DISTRICT COURT—CALIFORNIA.

Where it appeared, even after an adjudication of involuntary bankruptcy (although with consent of debtors), that the bankrupts had a notorious place of business in another district up to within six weeks prior to the filing of a petition of bankruptcy against them in the district in which the adjudication was made,

***Held*, that the court could not entertain a voluntary petition presented by the bankrupts for adjudication, owing to such residence and place of business. That the fact that in one case the adjudication is demanded**

by a creditor, in the other asked for by the bankrupt, ought not reasonably to affect the determination of jurisdiction.

Consent cannot give jurisdiction. It makes no difference whether the proceedings are voluntary or involuntary. As all creditors are parties to and are bound by proceedings in bankruptcy that are regular, an adjudication which is not made and carried on within the proper jurisdiction should be set aside and vacated.

In re FOGERTY & GERRITY.

HOFFMAN, J.—On the 27th of May, 1870, a petition was filed on behalf of J. D. Fish & Co., of New York, praying that the above named parties be adjudged involuntary bankrupts. On the return day of the order to show cause the alleged bankrupts appeared and consented to the adjudication, which was accordingly made, and the matter referred to the Register.

A motion is now made on behalf of one P. D. Casey, an attaching creditor, that the adjudication be set aside, and all proceedings in bankruptcy vacated, on the ground that the court has no jurisdiction over the case.

In support of this motion various affidavits were read, from which it clearly appears that the alleged bankrupts have never conducted any business within this district, nor had any place of business established therein as distinct from their place of residence.

That they reside in the State of New York, where they have a notorious place of business, and that they arrived in this city about April 12th, 1870, some six weeks prior to the filing of the petition against them.

On this state of facts it is evident that this court would be without jurisdiction to entertain a petition in voluntary bankruptcy presented by the bankrupts.

By the 11th Section of the Bankrupt Act, a debtor desirous of availing himself of the provisions of the act is required to apply by petition "addressed to the Judge of the Judicial District in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months."

Under this and a somewhat similar clause, Act of 1841, that the District Courts have frequently declared themselves without jurisdiction to entertain the petition, make an adjudication or

grant a discharge where it appeared that the application had not been addressed to the judge of the proper district. In the case of Kinsman, before the late Judge of the Southern District of New York, 1 N. Y. Leg. Obs., 309, the objection appears to have been made on the part of creditors. In the case of Little, 2 N. B. R., 294, the discharge of the bankrupt was opposed by creditors and refused, the court declaring that the question whether the "petition was filed in the proper district, was a question of jurisdiction."

The discharge was refused *for want of jurisdiction* in this court to grant it. In other cases the Register to whom the matter was referred of his own motion, after examination of the petitioner, refused to adjudicate for the same reason, and his decision was sustained by the court. *In re* Magie, 1 N. B. R., 522.

In the case of Walker, 1 N. B. R., 386, a creditor filed a petition similar to that preferred in the case at bar, to vacate all proceedings in the cause for want of jurisdiction, averring that the bankrupt had not resided in the district for the greater part of the six months next preceding the filing of the petition.

The court, Lowell, J., held on the facts that the residence was established, but no doubt seems to have been entertained that if the facts had been otherwise, the prayer of the petition must have been granted. The 39th Section, on which proceedings in involuntary bankruptcy are founded, does not, like the 11th Section, designate the District Judge to whom the petition of the creditor shall be addressed.

It provides that "any person residing and owing debts aforesaid, who, after the passage of this act shall," etc. (the various acts of bankruptcy are then enumerated, and the sentence continues), "He shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors," etc.

The succeeding section provides that "upon the filing of the petition authorized by the next preceding section, if it

shall appear that sufficient grounds exist therefor, *the court* shall direct the entry of an order," etc.

The 41st and 42d Sections provide for further proceedings, and for the final adjudication that the debtor is a bankrupt.

These proceedings are to be taken in the court in which the creditor's petition has been filed, but in which of the District Courts the petition is to be filed, the act does not, in terms, declare.

It cannot, I think, be contended that any of the District Courts at the election of the creditor can entertain the petition. For, in such case, it might be filed and the debtor cited to appear in a remote district, where he has never resided nor carried on business, where he has no property, and where none of his creditors live. The inconveniences and the opportunities for collusion which would thus be presented, make it evident that such could not have been the intention of Congress.

It may, with more plausibility, be urged that the court to which the petition is to be presented, is the court of the district in which the act of bankruptcy has been committed.

But the objections to this construction are insuperable.

The alleged act of bankruptcy may have been committed in a district where neither the debtor nor any of the creditors reside or carry on business. It may have been done by the debtor while temporarily passing through a district remote from his residence or place of business, or even while traveling through various districts. To compel him to appear to answer before the court of the district in which he happened to be when the alleged act was committed; to oblige all the creditors whose places of residence may be distant, to appear before the same tribunal; to appoint an assignee in that district to take possession of property, no part of which might be found within it, would be productive of intolerable hardships and vexations.

Moreover, if the jurisdiction to entertain the petition is deemed to be given exclusively to the court of the district where the act of bankruptcy has been committed, cases might often occur where no court would have jurisdiction, for the fraudu-

lent payment, gift, sale, conveyance, transfer, might have been made out of the limits of any district, as, for example, by a passenger on his voyage by sea to or from this place and an eastern port.

The fifth clause of Section 39 enumerates as an act of bankruptcy the making of an assignment, gift, sale, etc., of estate, property, rights, etc, either within *the United States or elsewhere*, with intent to hinder, delay, or defraud creditors. Under the construction we are considering, no court could take jurisdiction of an act of bankruptcy of this description if committed without the limits of the United States.

That this construction of the act was not contemplated by the Supreme Court, is evident from the language of the Sixteenth Order in bankruptcy.

It provides that when two or more petitions shall be filed against the same individual in the different districts, the first hearing shall be had in the district in which the debtor has his domicil.

If petitions could be filed only in the courts of the district in which an act of bankruptcy had been committed, the general order referred to would afford no means of determining in which court the first hearing should be had.

The terms of the general order indicate that where several petitions are filed against a debtor, one of them at least will have been filed in the district of his domicil, and it may fairly be inferred, from the tenor of the order, that the Supreme Court understood that proceedings against a debtor to procure an adjudication of involuntary bankruptcy were like those instituted by himself to obtain an adjudication of voluntary bankruptcy, to be had in the court of the district in which he has resided or carried on business for the preceding six months, or for the longest period thereof.

And this construction seems not only reasonable and less objectionable than any other which can be suggested, but most in accordance with the other provisions of the act.

It has been said that the scope and purpose of the 39th Section are to oblige insolvent debtors to take the benefit of the Bank-

rupt Act, and thus to insure an equal distribution of their estates under its carefully framed provisions.

By the 39th Section he can be compelled to do what, by the 11th, he was permitted and invited to do. The fact that, in one case, the adjudication is demanded by a creditor, and, in the other, is asked for by the bankrupt, ought not reasonably to affect the determination of the question as to what tribunal has jurisdiction over the case.

The only case cited where the question we are considering has arisen is that of *in re* Palmer, in the Southern District of New York.

In that case the debtor against whom a petition had been filed in the Southern District, resided and carried on business in the Northern District of New York.

The learned judge of the Southern District dismissed the proceedings for want of jurisdiction.

It is urged that, inasmuch as the bankrupt has assented to this proceeding, the objection cannot be raised by a creditor who has intervened.

But consent cannot give jurisdiction. And that the question is one of power and jurisdiction in the court is evident, nor can it make any difference whether the proceeding is in voluntary or in involuntary bankruptcy. In the one case the petition is filed by the bankrupt, and in the other by a creditor. But, in either case, it must be addressed to the court authorized by law to take cognizance of the case, and to none other.

Nor can it even be said, in this case, that the parties have submitted to the jurisdiction. One creditor has invoked it, and the bankrupts have not objected. But all other creditors are parties to and bound by the proceeding: if it be sustained, the ordinary remedies against the debtor will be suspended; the whole of his property will pass into the hands of an assignee, and they will be obliged to come into court to prove their debts, enforce their liens, adjust their accounts, and receive dividends, and the unsatisfied claims may be forever barred by the discharge of the bankrupt. They have, therefore, a clear right to be heard, and to resist the proceeding on the ground that the court is without jurisdiction.

My opinion is, that under the facts of this case the court has no jurisdiction, and that the adjudication and other proceedings in this cause, should be set aside and vacated.

UNITED STATES DISTRICT COURT—CALIFORNIA.

Where an insolvent debtor executed a bill of sale to a creditor who had obtained the levy of an attachment after notice of the debtor's insolvency, the same was a violation of the Bankrupt Act.

Its inevitable effect was to give a preference. Although insolvency exists, yet, if the debtor honestly believes he shall be able to go on in his business, and with such a belief pays a just debt without a design to give a preference, such payment is not fraudulent, although bankruptcy should subsequently ensue.

If the debtor is cognizant of his own insolvent condition, and expects to stop payment, and makes a payment, or gives security to a creditor for a just debt, with a view to give a preference, such payment, or giving of security, is fraudulent as against creditors, and property thus transferred may be recovered by the assignee in bankruptcy, and the debtor's discharge will be denied.

In re Gregg.

Hoffman, J.—This is a proceeding brought by the assignee to recover certain property alleged to have been transferred by the bankrupt in fraud of the act. On the 2d September, Knox, to whom the bankrupt was indebted for a balance due on two promissory notes, levied an attachment on all the property of the latter, consisting of a piece of land, and a house in which the bankrupt resided, and a saloon, stock of liquors, fixtures etc. On the same day, Knox and the bankrupt entered into an agreement by which the former was to execute a bill of sale to Knox for the saloon, stock in trade, etc., in payment of the notes, and the latter was to discontinue his suit, and release the house and land from the attachment. This was, accordingly, done, and the possession of the saloon, etc., delivered to Knox, who surrendered to the bankrupt his notes.

Very soon afterwards the bankrupt declared the real property a homestead under the laws of the State. At the time of these transactions the bankrupt was largely insolvent, and of this the creditor was informed a few days before the attach-

ment was levied. There can be no doubt that this payment by the bankrupt was a violation of the act.

Its inevitable effect was to give a preference to one creditor at the expense of all the rest, and to appropriate to the satisfaction of his debt a great part of the property of a person who knew himself to be hopelessly insolvent. "The policy and aim of the Bankrupt Laws," says the Supreme Court, "are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim it is to divide the assets equally, and therefore equitably." *Shawhan* v. *Wherritt*, 7 How., 744. It is urged that to constitute an act of bankruptcy of the kind under consideration, it is necessary that the *intent* to give a preference should exist, and that this intent cannot be inferred from the mere fact of actual insolvency. The law on this point is well laid down in *Jones* v. *Howland*, 8 Met., 377. "The result of these cases," says the court, "is the drawing of a distinction between the actual insolvency and a contemplated bankruptcy, between the payment of a just debt, in the course of business, though insolvency exists, and is known to the insolvent, and the design to give a preference in view of stopping payment. And, in view of all the authorities, we hold the law to be this — that, although insolvency in fact exists, yet, if the debtor honestly believes he shall be able to go on in his business, and with such a belief pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterwards ensue. And, on the other hand, if the debtor, being insolvent, and knowing his situation, and expecting to stop payment, shall then make a payment, or give security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment, or giving security, is fraudulent as against the creditors, and property that is transferred in making such payment, or giving the security, may be recov-

ered by his assignee, and the debtor will not be entitled to a discharge under the statute. It rests upon the intent with which the act was done, and the intent is to be proved as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved."

These observations are cited with approval in *Morgan, Root & Co.* v. *Mastick*, 2 N. B. R., 521, and in *Doan* v. *Compton*, 2 N. B. R., 607, and the same principles are substantially laid down in numerous cases. *Farrin* v. *Crawford*, 2 N. B. R., 602; *Wadsworth* v. *Treadwell*, 2 N. B. R., 316; *Langley* v. *Perry*, 2 N. B. R., 180, 596. It will be perceived that, in the case at bar, all the circumstances exist, which in the above extract are supposed to furnish clear evidence of a fraudulent intent.

The debtor was insolvent, and perfectly aware of his situation. His transfer to the creditor included his whole stock in trade. It at once deprived him of the means of conducting his business, and involved the necessity of an immediate stoppage.

As his entire property had been seized, the effect of the payment in full to the attaching creditor, was to liberate his house and land from the attachment, and to put it in his power, unless prevented by a proceeding in bankruptcy, to declare it a homestead, and withdraw it from the reach of his creditors. This he attempted to do, and, whether successful or not, the attempt shows an intention to satisfy one creditor's demand by applying to its payment all the property of the debtor, which he intended to be appropriated to the payment of his debts.

The 35th Section of the act provides that if the transfer is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

The burden of proof is thus thrown upon the bankrupt to repel the presumption of fraud raised by the law.

The circumstances of the case, so far from repelling, strengthen the presumption, to the exclusion of any other hypothesis. It being clear, then, that the bankrupt intended to give the prefer-

ence which was the necessary consequence of the transfer, it remains to inquire whether the person receiving it had reasonable cause to believe that a fraud on the act was intended. He knew that the debtor was insolvent. He knew that he himself had attached all his property, and that the debtor had committed an act of bankruptcy by the non-payment of his commercial paper for more than fourteen days. He knew that the inevitable consequence of the transfer was to break up the business of the debtor, and that it was made in view of stopping payment.

Under these circumstances he not only had reasonable cause to believe, but he must have known that the payment to him was a preference by an insolvent debtor, and was necessarily intended to be such. It was, therefore, a fraud on the Bankrupt Act.

I am, therefore, of opinion that the payment and transfer were void, and the property transferred or its value can be recovered by the assignee for the benefit of the estate, as provided in the Bankrupt Act.

UNITED STATES DISTRICT COURT—CONNECTICUT.

The petition of assignees in bankruptcy to have the levy of an execution on personal property of the bankrupts declared void, will be granted where it appears that such levy is not in conformity with the laws of the State in which the same is made.

BEERS *et al.*, *Assignees*, v. PLACE & Co. *et al.*

SHIPMAN, J.—This is a bill in equity praying this court to declare void a levy of an execution upon certain machinery of the bankrupts, and thus remove a cloud on the title of the assignees thereto. The facts which have led to this controversy are as follows: The Allerton Iron Works Manufacturing Company were a corporation located at Norwalk, Connecticut, and engaged in building machinery. They had a machine-shop, and such tools and machinery as are necessary in a business of that character.

On the 10th of January, 1870, Reynolds & Co., a corporation located at New Haven, brought a suit against the Allerton Iron Works Manufacturing Company (the bankrupts), and attached the machinery in their shop at Norwalk to the amount of four thousand dollars. The writ upon which this attachment was made, was returnable and returned to the Superior Court for New Haven county on the first Tuesday of March, 1870; and on the 30th of the same month judgment was rendered in favor of the plaintiffs therein against the bankrupts for one thousand one hundred and fifty-six dollars and ninety-one cents.

On the 3d of February, 1870, the same property was attached by the New York Steam Engine Company for two thousand two hundred dollars. On the same day the defendants, George Place & Co., attached the same property for two thousand dollars; and on the 22d of April following, judgment was rendered in their favor and against the bankrupts for one thousand five hundred and seven dollars and sixty-eight cents, and execution issued thereon. On the 2d of May, 1870, the officer claimed to levy this execution on the machinery in question, the New York Steam Engine Company waiving any rights under their attachment. But the lien by the prior attachment of Reynolds & Co. was not waived, but was still in force. The officer posted the same for sale under the execution, according to the law of Connecticut. The sale has never in fact taken place, but has been from time to time adjourned by the officer, he having been enjoined from selling by the State court on the application of the assignees, the present plaintiffs, who have now brought this bill. The injunction of the State court is temporary, and the judgment creditors, George Place & Co., insist upon their right to have the property sold on the execution in their favor as soon as the injunction is removed.

On the 3d of May, 1870, the Allerton Iron Works Manufacturing Company filed their petition in this court, praying to be declared bankrupts under the Act of Congress, and on the 9th of the same month were adjudicated bankrupts. The plaintiffs claim this property, over which the levy of the de-

fendants' execution is hanging, and ask leave for a decree of this court declaring it void, in order that they may sell it at its full value, unembarrassed by this alleged lien of the defendants.

It will be noticed that all these attachments, and the execution in question, were levied on the property within four months next preceding the filing of the petition in bankruptcy. The attachments were therefore dissolved by operation of the Bankrupt Law when the debtors went into bankruptcy, as they were all attachments on *mesne* process under the statutes of Connecticut. The present defendants claim, however, that, as the Bankrupt Act only dissolves attachments on *mesne* process, the levy of their execution is left undisturbed. And it is true that the 14th Section of the act dissolves such attachments only, and not levies of execution. The law, therefore, seems to contemplate possible results that are somewhat singular. An attachment on *mesne* process of any age short of four months, is dissolved absolutely by the adjudication, and the latter relates back to the time of filing the petition. But an execution, actually and legally levied, remains, and the property is held by it, even though the suit upon which it was founded may not have been commenced ten days before the filing of the bankrupt's petition. It may be asked why the older attachment is dissolved while the recent levy of the execution is protected? Why the levy of the execution, except in cases where it is to enforce a lien secured by an attachment more than four months old, should not share the fate of attachments that are less than that age? It is not necessary to answer these questions in the present case. One obvious difficulty in the way of dissolving levies of executions, and thus invalidating proceedings under them, would arise out of unsettling titles to property sold under such process. *Bona fide* purchasers of personal and real property at judicial sales might find their titles suddenly annihilated by a decree in bankruptcy. Their vendees would be in the same predicament. This mischief would not indeed result from dissolution of proceedings under executions merely levied where the sale under them had not actually

taken place. Yet Congress has not seen fit to make the adjudication in bankruptcy operate to dissolve them. But, as already intimated, this peculiar feature of the statute need not be vindicated in the present case.

The plaintiffs insist that the levy of the execution in question was void, inasmuch as there was a prior attachment lien in force upon this property, when the attempted levy was made. The solution of this question depends, not upon the Bankrupt Act, but upon the true construction of the statutes of Connecticut relating to attachments on *mesne* process and the levy of executions. The practice of attaching property on *mesne* process and holding it in the custody of the law, subject to execution upon judgment recovered in the same suit, has been sanctioned by the law of this State for more than two hundred years. The process has been regulated by statute for a century. In 1770 the colonial Legislature passed the act of which the following was a section: "No estate attached as aforesaid shall be held to respond to the judgment obtained by the plaintiff at whose suit the same is attached, either against the debtor or any other creditor, unless such judgment creditor take out execution on such judgment and have the same levied on the goods or personal estate within sixty days after final judgment, or on real estate, and have the same appraised and recorded within four months after such judgment obtained; or, if such goods or estate are encumbered by any prior attachment, the execution be levied as aforesaid within the respective times aforesaid after such incumbrance is removed." Laws of Connecticut, October session, 1770. This section has never been repealed or modified, but has remained in force down to the present time. Revised Statutes of Connecticut, 1865, p. 6, 7. The practice has been uniform under it. The first attaching creditor has sixty days in case of personal property, and four months in case of real estate, after final judgment, within which to levy his execution and thus enforce his attachment lien. After he has done so, or his time has expired, then the second attaching creditor has the same length of time within which to levy his execution. The third attach-

ing creditor has the same time after the second, that the second does after the first, and so on till the property is exhausted, or the attachments are all satisfied. This is the natural and orderly mode of proceeding, and has been universally followed in this State for more than a century. No case has been cited showing even an attempt to introduce a different practice, and after a thorough search I have been able to find none. If there had been no statute regulating the order in which executions should be levied under successive attachments, this long and uniform practice, so consonant with good sense and the orderly administration of justice, would be strong evidence that such had been the settled policy of the State in the disposition of debtors' property thus taken into the custody of the law and held to respond to the liens of attaching creditors. But a careful examination of the statute in question leaves no room for doubt as to what it prescribes. The language is explicit, that "no estate attached as aforesaid shall be held to respond to the judgment * * * either against the debtor or any other attaching creditors, *unless* such judgment creditor take out execution and have the same levied"—when?—on personal estate within sixty days, and on reale state within four months, or, in case of incumbrances by prior attachment, "*unless* the execution shall be levied as aforesaid, within the respective times as aforesaid, *after* such incumbrance is removed." It would be difficult to use language more explicit. The act plainly says to the first attaching creditor, you shall levy your execution within sixty days on personal property, and within four months on real estate, or it shall not be held to respond to your judgment. To the second attaching creditor it says, with equal explicitness, the property shall not be held to respond to your judgment, unless you levy your execution within sixty days on personal property, and within four months on real estate, *after* the first lien by attachment is removed. These respective periods within which first and subsequent attaching creditors are to enforce their liens, are thus marked out with precision. One does not begin until the other ends, unless the word "after" is destitute of meaning. All conflict, confusion, embarrassment, or failure of justice is thus avoided.

So just is this mode of procedure, that if the language of the act were somewhat doubtful, courts would struggle to maintain the practical construction hitherto given it. But as I have already stated, the language is too plain to admit of question, and, after having received this practical interpretation for a century, it should not be disturbed now by an innovation which would introduce confusion, uncertainty, and injustice.

If this view of the law needed any further support, it would be found in the consequences which would inevitably follow if subsequent attaching creditors were allowed to levy their executions subject to prior attachments. The extent and value of such prior liens can never be determined until judgment in the suits out of which they originated be rendered; and even then it can never be known whether the creditors having such liens would enforce them or not, until after the expiration given them by statute. Take the case of a prior attachment upon a suit for a *tort*. The property attached is taken into the custody of the law to respond to such judgment as may be recovered. There is an inchoate lien to the extent of the direction in the writ. The extent and value of this lien which may finally be enforced against the property attached, depends upon a great variety of facts and circumstances, including, often, even the motives and intentions of the alleged *tort-feasor*, which cannot be approximately guessed at, much less estimated or appraised, until the case is heard and judicially determined. To allow property thus situated, and in the custody of the law, to be sold subject to such a lien, could not fail to often work the grossest injustice to the debtor, by sacrificing his property for a nominal sum bid by a speculative purchaser. Indeed, such a disposition of the property would not merit the name of a sale, for a sale implies that it be for such value as the judgment of purchasers in the market may put upon it. But no judgment of its value under such circumstances can be formed. Purchasers can have no information upon which to found such a judgment. In the case supposed, the first attachment lien might be swept off by a judgment in the defendant's favor, or reduced to a nominal sum if the plaintiff should recover at all,

and yet he might find his whole property attached had been sold by a second attaching creditor, to satisfy some petty judgment of the latter. The same absurd and oppressive results would often follow in suits on contracts. A law which should thus take the property of the citizen into its custody, and make such an unjust and arbitrary disposition of it, would not long be tolerated in any civilized community. The mischievous consequences of such a proceeding would be endless. Some of them are well stated in *Barnard* v. *Fisher*, 7 Mass. R., 71.

In the case of *Pease* v. *Bancroft*, 5 Met. R., 90, involving the question whether a sale of an equity of redemption on a second attachment, pending the first, would have been good as against the debtor, the court decline to express an opinion, though they give a good reason why it ought not to be held good. The court, however, held that such a sale, by a second attaching creditor, was void as against all the others, and thereby let in a third attaching creditor to the rights which the second would otherwise have retained. But I attribute no importance to the doubt implied, from the language of the court in *Pease* v. *Bancroft*. In the first place, the language of the Statute of Connecticut regulating the levy of executions, expressly provides, that the property shall not be held to respond to the judgment "either against the *debtor* or any other creditor," unless execution is taken out and levied in the order and within the time provided. In the second place, the present case comes within the principle laid down in *Pease* v. *Bancroft*, for the assignees represent the creditors of the bankrupt as well as the bankrupts themselves, and can take advantage of any remedy which would have been open to subsequent attaching creditors. It follows from these views, that the levy of the execution having been made while there was a subsisting prior incumbrance by attachment on the same property, the same is void under the law of Connecticut.

But it is said that the plaintiffs have adequate remedy at law, and are therefore entitled to no relief in equity. There might be force in this objection, but for the peculiar provisions of the Statutes of Connecticut relating to attachments and executions

levied on machinery used in manufacturing establishments. Attachments of such property are made, where it cannot be removed without manifest injury, by particularly describing the same in the return of the officer, and leaving a copy of the writ with such return thereon in the town clerk's office, in the town where the same is situated. In case of the levy of an execution, notice thereof is posted by the officer on the door of the building in which the same is situated. This course was pursued in making the levy in question. The officer making it has no actual possession, but his official acts, done, as he claims, under color of law and in the execution of legal process, constitute a cloud on the title of the assignees that might well affect the price in the market. Such a cloud it is the peculiar province of a court of equity to remove. But even if the officer had actual possession of this property, holding it under this alleged color of right, on a proper application, this court might feel called upon to exercise the power conferred upon it by the Bankrupt Act, and compel him to deliver it to the assignees, instead of turning them over to an action of trover. But this question does not arise in the present case. I am satisfied that the plaintiffs are entitled to have this proceeding of the defendants under their execution declared void, except as to the levy on the upright drill, which was not attached by Reynolds & Co., and a decree will be entered accordingly, with costs to be apportioned.

Lewis F. Beers and *Stephen W. Kellogg*, for the plaintiffs.

Asa B. Woodward and *Henry C. Robinson*, for the defendants.

UNITED STATES DISTRICT COURT—OREGON.

C & D, partners in business, became insolvent, and confessed a number of judgments in favor of creditors.

E & F, knowing of the insolvency of C & D, at the time their judgments were taken out, caused executions to be issued upon these judgments, and then directed their agent to have the sheriff turn over the property to any agent whom the creditors might agree upon, or to the marshal, in case proceedings should be instituted under the Bankrupt Law.

In re J. J. and C. W. Walton.

C & D were subsequently adjudged bankrupts, and E & F made no resistance to the marshal's seizing the property levied upon under their executions, and with their offer to prove their debts in bankruptcy, they also offered to surrender any advantage or preference which they may have obtained by their proceeding against C & D.

Held, that E & F, having taken preferences contrary to the Bankrupt Law, cannot be allowed to prove their debts in bankruptcy. That it is immaterial what use these creditors may have ultimately intended to make of their preference, as the law does not trust the legal rights of one portion of the creditors to the judgment or good intentions of the others.

In re J. J. AND C. W. WALTON.

OPINION OF THE REGISTER.

THE assignee, Joseph Bachman, objects to the proofs of debt offered by Allen & Lewis and Henry Failing, and files specifications of his objection according to the order of the court heretofore made; the creditors, Allen & Lewis and Failing, file answer, and the assignee replies.

The matter came on to be heard before me under the order of the court, the assignee appearing by Messrs. Whally & Fechheimer, his attorneys, and Messrs. Allen & Lewis and Failing appearing by Mr. E. D. Shattuck, their attorney. The two cases being similar, and the evidence being taken in writing, the parties agreed that the same evidence should be used in both cases. After closing the evidence, the attorneys for the respective parties submitted the matter upon written arguments; and after full consideration, I find the following to be the facts:

First. On the 27th day of June, 1868, J. J. and C. W. Walton, being then partners under the name of J. J. Walton & Son, were indebted to these creditors as follows: To Allen & Lewis, three thousand nine hundred and eighty-two dollars and sixty-four cents; to Failing, two thousand and two dollars and thirty-three cents; which indebtedness was for goods sold to said J. J. Walton & Son.

Second. That at the same date said J. J. Walton & Son were largely indebted to divers other persons, most of them residing at Portland, Oregon, for goods sold them.

Third. That at that time said J. J. Walton & Son were insolvent.

Fourth. That on the said 27th day of June, these creditors, Allen & Lewis and Failing, by their agent and attorney, E. D. Shattuck, at Eugene City, Oregon (the place of business of said Walton & Son), procured the said firm of J. J. Walton & Son to confess judgments in their favor for the amounts due them respectively, in the Circuit Court of the State of Oregon for the county of Lane.

Fifth. That on the 29th day of June, 1869, those creditors, Allen & Lewis and Failing, caused executions to be issued upon the judgments so confessed, and directed the sheriff to seize the property of said J. J. Walton & Son, upon those executions, and to act under the directions of J. B. Underwood as to further proceedings, and at the same time sent instructions by mail from Portland to Underwood, at Eugene City, to the effect that it was not their intention to get any preference in the final distribution of the moneys to be made by the sale of the property, but that it was their intention to avoid the expense of a division of the moneys under the Bankrupt Law; and further instructing him to have the sheriff turn over the property to any agent whom the creditors might agree upon, to sell the same and distribute the money to the creditors, or to the marshal, in case proceedings should be instituted under the Bankrupt Law, and the marshal, as messenger, should be directed by the court of bankruptcy to seize the property.

Sixth. That at the time of taking of said judgments by confession, and at the time of causing said executions to be issued, and at the time the property was seized upon said executions, these creditors, Allen & Lewis and Failing, knew that J. J. Walton & Son were insolvent; that is, could not pay all their debts in full, and their debts could not be paid in full upon sale of all their property under execution.

Seventh. That on the 2d day of July, 1868, proceedings were instituted by order of the creditors of said Walton & Son, to have them adjudged bankrupts, and that on the 28th day of July, 1868, they were adjudged bankrupts by this court upon the proceedings so instituted.

Eighth. That these creditors, Allen & Lewis and Failing,

made no resistance to the marshal seizing the property levied upon under their said execution; and that with their offer to prove their debts, they also offered to surrender any advantage or preference which they may have obtained by their said proceedings against said J. J. Walton & Son.

DEADY, J.—I concur in the conclusions of fact and law as found by the Register, and in his opinion in support thereof.

When the question was first raised as to the right of Allen & Lewis and Henry Failing to prove their debts, I inclined to the opinion that a creditor who had taken a preference contrary to the act might in *any* case be allowed to prove his debt upon the surrender of the property, benefit, or advantage obtained by him under such preference, as provided in Section 23. But after long and careful deliberation, I am forced to come to a different conclusion. I am now satisfied that to allow these creditors to surrender their unlawful preference and come in and prove their debts under Section 23, would be to violate both the letter and spirit of the act. It may be admitted that Section 23 is of general application, in both voluntary and involuntary cases, except as otherwise provided in Section 39. But the special provision in the latter section declaring that a creditor shall not be allowed to prove his debt in a *particular case*, so far excludes the operation of the general words of the former. Now, this special provision of Section 39 covers this case at every point, and therefore takes it out of Section 23.

Walton & Son, being insolvent, confessed a judgment and procured and suffered their property to be taken on legal process, with intent to give a preference to A. & L. and H. F. This being the case, the section declares that if the person receiving such preference "had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent," that the assignee may recover back the money or property paid or transferred contrary to the act, and that "such creditor," that is, the creditor receiving such preference, with reasonable cause to believe, etc., "shall not be allowed to prove his debt in bankruptcy."

These creditors, by their agent, had not only reason to believe, but knew, that at the time of giving this preference, Walton & Son were insolvent, and that in so doing they intended a fraud upon the act—that is, intended to evade its provisions by preventing their property from being distributed among their general creditors under it.

To these acts or conduct Section 39 attaches certain consequences: First, the preferred creditors may be *compelled* by the assignee to restore the money or property received under the preference; second, such creditors are prohibited from proving their debts in bankruptcy.

The first of these provisions is remedial, and furnishes the means whereby the wrong committed in giving and receiving a preference may be corrected. But the second is preventive, and intended to deter creditors from receiving preferences for fear of losing or forfeiting their debts thereby. Of the two, it is the more important and more likely to prevent violations or evasions of the act in this respect.

The liability to these consequences or penalties arises upon the same facts—the creditors taking a preference contrary to the act; but the right to enforce the one does not depend upon the enforcement of the other. They are distinct and cumulative. The assignee may recover back the money, or property, without objecting to the proof of debt, or the proof of debt may be excluded where there has been no such recovery.

What use these creditors may have ultimately intended to make of their preference is immaterial. Let it be admitted that they intended, so far as they knew, to share the proceeds of their executions with their fellow creditors *pro rata*. The law does not trust the legal rights of one portion of the creditors to the judgment or good intentions of the others. While, as a matter of fact, it may have been safe to do so in this case, in a majority of others it might or would not. Besides, a mere intention or even proposition on their part to admit the rest of the creditors to a share of the property was not a contract with such creditors which the latter could enforce. Such intention or proposition could have been changed or withdrawn by A. &

L. and H. F., at any time before it was realized or accepted, with impunity.

In legal effect, the transaction as claimed by these creditors was nothing more or less than obtaining a preference contrary to the act, with intention to make such arrangement with the general creditors as the parties taking the preference might think proper under the circumstances. This would be to make themselves judges in their own case.

An order will be made rejecting these claims, and directing the Register to refuse to allow them to be proved, and that A. & L. and H. F. be adjudged to pay the costs and expenses of this proceeding.

SUPREME COURT—MAINE.

The clause in Section 14 of the United States Bankrupt Act of 1867, providing that the conveyance therein mentioned "shall dissolve any attachment made within four months next preceding the commencement" of the debtor's proceedings in bankruptcy, is equivalent to an express provision for the preservation of an attachment made more than four months prior thereto.

The bankrupt's certificate of discharge duly pleaded in an action against him in the Supreme Judicial Court of this State, will not, by virtue of the R. S. of 1857, C. 81, Section 33, dissolve an attachment made by virtue of the writ in the action, more than four months prior to the defendant's commencement of proceedings in bankruptcy. The attachment thus made may be enforced by an execution issued upon a special judgment rendered by the court in which the action was entered and prosecuted. The District Court of the United States does not have exclusive jurisdiction in such matters.

Leighton *v.* Kelsey *et al.*

William Henry Clifford, for the plaintiff, cited *Franklin Bank* v. *Bachelder*, 23 Maine, 60; *Kittredge* v. *Warner*, 14 N. H., 509; *Davenport* v. *Tilton*, 10 Met., 320; Rowell's case, 21 Verm., 620; Drake on Attachment, 435; United States Bankrupt Act of 1867, Section 14; Pub. Laws of 1868, C. 157, 223; *Lothrop* v. *Abbott*, 21 Maine, 421; United States Bankrupt Act of 1841, Section 2; United States Bankrupt Act of 1867, Avery & Hobbs', Ed., 108; *Houghton* v. *Eustis*, 5 Law Rep., 505; *Downer* v. *Brackett*, 5 Law Rep., 392; *Peck* v. *Jenness*, 7 How., 612.

Shepley & Strout, for the defendants, elaborately argued the following propositions:

First. The replication is bad in form and substance, praying judgment whether the plaintiff ought to be precluded from having his "action against the said defendants," instead of his action *in rem* against the goods attached.

Second. By United States Bankrupt Act of 1867, Section 34, the discharge "releases" the bankrupt, and when pleaded, is a "bar" to the action, hence judgment must be for the defendant in such case. And by R. S. of 1857, C. 81, Section 33, "When final judgment is rendered for the defendant the attachment is thereby dissolved," and this statute is not repealed expressly or by implication.

Third. By the provisions of the Bankrupt Act no lien by attachment continues so as to be enforced under process from the State courts. Attachments are liens to secure judgments recorded against defendants, and whatever defeats the judgment defeats the attachment, unless saved by some statute. *Peck* v. *Jenness*, 7 How., 623. The United States Bankrupt Act of 1841, Section 2, expressly preserved attachments. Not so with the Act of 1867.

The national act has suspended all State legislation touching the matter of bankruptcy. *Sturgis* v. *Crowningshield*, 4 Wheat., 122; *Ogden* v. *Saunders*, 12 Wheat., 263; *in re* Bellows & Peck, 3 Story, C. C. R., 428.

The disposition of all liens under the Bankrupt Act is vested in the District Court of the United States; Bankrupt Act of 1867, Section 1. The State court has no jurisdiction. The lien is continued, if at all, by force of the United States Act, and the United States Court should administer it. If the proper steps had been taken before the proper tribunal prior to discharge, whatever lien there was could have been enforced. After discharge, the State court cannot modify its effect. *Ex parte* Foster, 2 Story, 157.

A State court, once having had jurisdiction, may continue to entertain it for the purposes mentioned in Section 21, even after the institution of bankrupt proceedings; but the enforce-

ment of a lien by attachment is not one of the purposes mentioned.

BARROWS, J.—To the defendant's plea of a discharge in bankruptcy, the plaintiff replied that an attachment of personal property was regularly made, more than four months before the commencement of the proceedings in bankruptcy, and was still subsisting (as he alleges), and that this suit is prosecuted for the sole purpose of obtaining a judgment and execution, which will enable him to perfect that attachment; and to this end alone he prays judgment against the defendants for his damages and costs. Defendants demurred to the replication and plaintiff joined. The presiding justice overruled the demurrer, and defendants alleged exceptions which have been elaborately argued.

The statutory provisions which are supposed to bear upon the question here presented, are as follows:

First. Section 34 of the Act of Congress passed in 1867, and entitled "An act to establish a uniform system of bankruptcy throughout the United States;" which provides that a discharge duly granted under the act shall release the bankrupts from all debts, claims, liabilities, and demands, which were, or might have been proved against his estate in bankruptcy, except such as are by said act excepted from the operation of a discharge in bankruptcy; and that such discharge may be pleaded as a full and complete bar to all suits brought on any debts, etc., not thus excepted, and that the certificate shall be conclusive evidence in favor of such bankrupt, of the fact and the regularity of such discharge.

Second. Section 14 of the same act, which provides that the conveyance to the bankrupt's assignee shall vest in him, by operation of law, all the property and estate of the bankrupt, both real and personal (with certain specified exceptions), although the same is then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings.

Third. Section 21 of the same act, prohibiting any creditor whose debt is provable under the act from prosecuting to final

judgment any suit therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined, and commanding the stay of any such suit on the application of the bankrupt for a reasonable time, to await the determination of the court in bankruptcy on the question of discharge, with the proviso, that if the amount due the creditor is in dispute, he may proceed to judgment by leave of the court in bankruptcy, for the purpose of ascertaining the amount which shall thereupon be proved in bankruptcy.

Fourth. Section 1 of the same act, extending the jurisdiction of the District Courts of the United States to the collection of all the assets of the bankrupt, and to the ascertainment and liquidation of the liens and other specific claims thereon.

The defendants claim that under Sections 21 and 34 of the United States Bankrupt Act, judgment must necessarily be rendered for the defendants upon pleading the discharge with profert of the certificate, which they have done, and that thereby the attachment will be dissolved by force of Chapter 81, Section 33, R. S.; and that in any event, even if an attachment made more than four months before the commencement of proceedings in bankruptcy can be held to create a valid lien capable of being enforced, it must, under Section 1 of the Bankrupt Act, be enforced by proceedings in the District Courts of the United States, which they insist has exclusive jurisdiction of all matters pertaining to the ascertainment and liquidation of liens upon the bankrupt's estate.

On the other hand, the position assumed by the plaintiff is, that Section 14 of the Bankrupt Act, above quoted, preserves all attachments made more than four months before the commencement of the proceedings in bankruptcy, and that chapters 157 and 223 of our statutes of 1868, harmonize with this view of the Bankrupt Law; and, taking the whole together, there is nothing in our own legislation, or in that of the United States, to preclude the rendition of the special judgment and special award of execution, which he prays for in his replication. And we think this position is successfully maintained.

To bar the judgment to which the plaintiff would otherwise be entitled, the defendants rely upon certain statutory provisions. These are all to be combined together, giving paramount force to the Act of Congress, if the State law is found to be in conflict with it, but having due regard for the rules which require that every section and clause shall be expounded with reference to every other, and, if possible, the effect designed by the Legislature given to each; that that which is required or excepted by necessary implication from any of the provisions of the statute, is to be regarded in the same manner as if it were done in express terms; and that whenever a right is given by statute, all the means necessary to make the right effectual, are given also.

Thus looking at these various provisions, we cannot hesitate to say, that an attachment made, as was the plaintiff's, more than four months before the commencement of the defendant's proceedings in bankruptcy, is preserved by necessary implication from Section 14, which dissolves only those attachments made within four months from such commencement; that this is equivalent to an express provision for the preservation of such an attachment as we have in the case at bar; that the only mode of preserving the attachment, known to the law, is by the rendition of such a judgment by the court in which the process is pending, as will enable the party making it to perfect the lien thereby acquired; that from this it follows that the provisions in the Bankrupt Act, making the discharge in bankruptcy a good plea in law, etc., are not to be so construed as to prevent the rendition of such judgment in the cases which are thus made exceptional; that is, in all cases where an attachment was duly made four months before the commencement of the proceedings in bankruptcy, if, upon the pleadings or evidence, the plaintiff is found otherwise entitled to judgment in his favor, the plea of bankruptcy must not be held to preclude him from having such a judgment as will place it in his power to avail himself of his attachment; for only thus can the due and proper effect be given to that clause in the Bankrupt Act, which was designed to prevent the dissolutions of those attachments. A

judgment in favor of the bankrupt defendant, such as his counsel here claims, would operate not as an ascertainment and liquidation of the lien, but as a dissolution of it by virtue of our own statute. R. S., C. 81, Section 33.

We see no difficulty in giving full force and efficacy to that clause in the Bankrupt Act, which confers on the District Courts of the United States jurisdiction over the ascertainment and liquidation of such liens, without supposing that it was intended to defeat them by taking from the court, under whose process they exist, the power of rendering special judgments necessary to complete them.

The error into which the defendant's counsel falls, consists in the assumption that the preservation of these attachments, by necessary implication from the clause in Section 14 of the Bankrupt Act of 1867, is not equivalent in effect to a provision in express terms for their preservation—such as was made for the preservations of liens in the Bankrupt Law of 1841.

Correcting that mistake, we follow, in awarding the judgment claimed by the plaintiff, the same course of proceeding which was pursued in the cases arising under the Bankrupt Law of 1841. *Davenport* v. *Tilton*, 10 Met., 320; *Kittredge* v. *Warren*, 14 N. H., 509; *Kittredge* v. *Emerson*, 15 N. H., 227; *Franklin Bank* v. *Bachelder*, 23 Maine, 60.

It is true that the principal question discussed in those cases, was whether an attachment on *mesne* process constituted a lien within the meaning of that clause in the Bankrupt Act of 1841, which protected existing liens against the operation of the law; but the questions here presented arose incidentally, and are treated with such fullness of learning and ability, that one can enter the same field now, only as a disciple and copyist.

A simple reference, then, is all that is deemed necessary.

Exceptions overruled.

Appleton, C. J., Cutting, Dickerson, Danforth, and Tapley, J. J., concurred.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Upon a motion to set aside the discharge granted to a bankrupt, the wife of the bankrupt cannot be required to testify as a witness against her husband.

Creditors moving to set aside the discharge, may not prove, at the trial, acts of the bankrupt not set forth in the specifications.

TENNY & GREGORY *v.* COLLINS.

TREAT, J.—The bankrupt had been granted a discharge, no debts having been proved against his estate, and no assets coming to the hands of his assignee. A year after the discharge, a petition was filed by two of the creditors to set it aside, alleging that the bankrupt had willfully sworn falsely in his schedules, and in his examination by the assignee, in stating that he had no property, whereas the creditors alleged that he had an equitable estate in some oil lands in Pennsylvania, and owned lands in Texas; and was also interested as a partner in a firm in which his name appeared. At the trial the plaintiffs proved that in 1866 the bankrupt had an interest in some oil lands, with other parties, upon which payments had been made, and that he made the final payment and had the deed executed to his father-in-law; that in 1868, after the discharge, purporting to act as agent, he sold the land and expended part of the money in payment of one of his scheduled debts. The testimony showed that the bankrupt, in 1866, was indebted to his father-in-law, to an amount exceeding the supposed value of the oil lands, and that he caused the lands to be conveyed in payment of this debt, the value being about two thousand dollars, as the bottom had fallen out of the speculation in oil lands in the vicinity of those thus conveyed; and that when the sale was made in 1868, the price obtained was more than double the sum at which they were taken, and that, for this reason, the father gave the son-in-law one thousand dollars of the proceeds of the sale.

The Texas lands were purchased for one hundred dollars, and were sold for one hundred and twenty-five dollars, more than six

months before the application in bankruptcy, and the money was expended in the support of the bankrupt's family.

The plaintiffs also summoned the wife of the bankrupt, who was sworn as a witness, and were proceeding to examine her in relation to the conveyance, in 1866, of land held in her name by herself and husband to her father, in payment of other debts, and as a security for debts upon which he was jointly liable with the bankrupt.

Objections were interposed, that while the Bankrupt Act provided for the examination of the wife of the bankrupt before the Register, for the purpose of ascertaining the condition of his estate, it did not alter the common rule that the wife could not be a witness for or against the husband in a motion to set aside the discharge.

The objection was sustained by the court.

The court also held that conveyances made by the bankrupt and alleged to be fraudulent, could not be shown in evidence unless charged in the specifications, except so far as that might be used to show the intent of certain acts specified in the petition.

The court, upon the evidence, decided that the specifications were not sustained, and dismissed the motion.

Whittelsey, with *Mauro*, for bankrupt.

Stewart, with *Torry*, for petitioners.

UNITED STATES CIRCUIT COURT—W. D. PENNSYLVANIA.

The deposition of a witness to acts of bankruptcy in an involuntary proceeding cannot be amended, because it is the proof upon which the rule to show cause issues, and without which the whole proceeding is defective.

MAY *v.* HARPER & ATHERTON.

Sur motion to dismiss creditors' petition.

McCANDLESS, J.—A jury being called, and before they were sworn, attorney for creditors asks and has leave to amend the

petition which is allowed because the creditors' petition is a part of the pleadings in the case. He further asks leave to amend the deposition of the witness as to the acts of bankruptcy, which is refused, because it is the proof upon which the rule to show cause why he should not be declared a bankrupt issues, and without which the whole proceeding is defective. This deposition of W. L. Harper proves no act of bankruptcy, and the proceedings are dismissed at the cost of the petitioning creditor.

UNITED STATES CIRCUIT COURT—LOUISIANA.

[Before J. J. BRADLEY & WOODS.]

In computing the time within which an appeal in bankruptcy must be taken, Sunday is to be counted, except that when the last day would fall on Sunday, that Sunday is to be excluded.

The decision of a District Court, sitting in bankruptcy, upon an application to confirm a sale made of a bankrupt's estate, is not a matter within the general supervisory jurisdiction conferred by Section 2 of the Bankrupt Law of 1867, 14 Stat. at L., 520, upon the Circuit Courts.

A proceeding in bankruptcy, from the filing of the petition to the distribution of the bankrupt's estate and his discharge, is a single statutory proceeding.

When it occurs, pending this proceeding, that the assignee or creditor is driven to file a bill in equity or bring an action at law, the Circuit Court has no supervisory jurisdiction of the proceedings had therein; nor has it when the claim of a supposed creditor has been rejected in whole or in part, nor where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal.

Other questions, however, arising in the District Court in the progress of a case in bankruptcy, whether of legal or equitable cognizance, fall within the supervisory jurisdiction of the court, and may, upon bill, petition, or other proper process of any party aggrieved, be heard and determined in the Circuit Court as a court of equity.

In re YORK & HOOVER.*

WOODS, J.—York & Hoover having been declared bankrupts by the adjudication of the District Court, E. E. Norton, their assignee, filed a petition in said District Court sitting as a court of bankruptcy, praying for an order to sell two planta-

* See 8 N. B. R., 662.

tions, the property of bankrupts. An order of sale was made, and under it a sale of the plantations, called respectively "White Hall" and "Home," was made on the 16th day of February, 1869, and Ober, one of the creditors, became the purchaser. On a later day, in February, 1869, C. H. Slocomb, one of the creditors of York & Hoover, filed his petition in the District Court, setting forth the fact of the sale to Ober; that no deed had, at the time of filing his petition, been made by Norton, the assignee, to Ober; charging that the sale was fraudulent, and therefore illegal and void, and praying, on behalf of himself and other creditors of York & Hoover, that Ober, Norton, the assignee, and others show cause, on Saturday, March 6th, 1869, at eleven o'clock, A. M., why the sale should not be set aside; and in the meantime that they, and each of them, might be enjoined from taking any steps towards perfecting said sale, or conveying said plantations to the purchaser.

Pursuant to the prayer of this petition, an order was made, and the parties named were cited to show cause why the prayer of the petition should not be granted.

The minutes of the District Court of the date of March 19th, 1864, show the following entry:

"No. 603. Matter of York & Hoover. On motion of H. D. Stone, attorney of E. E. Norton, and upon showing to the court that a sale was made of two plantations surrendered therein—namely, the 'Home' and 'White Hall' plantations, situated in the parish of Concordia (here follows a description of the two plantations), on the 16th February, 1869, and upon further showing to the court that the following parties appear to have had mortgages, privileges, claims, and liens upon said plantations (here follow the names of some fifty creditors), it is ordered that the parties above-named, and the bankrupts, and all persons interested therein, show cause on the 1st day of May, 1869, at eleven o'clock, A. M., why said sale should not be confirmed; and at the same time the priority and rank of said mortgages, privileges, liens, and claims be fixed and adjudicated; that, as so adjudicated, the same be directed to be paid; that notice thereof be given by publication in the New

Orleans *Republican* for three days, the last publication to be at least ten days before such hearing."

After this order to show cause was made by the court, precisely when we are unable to ascertain from the papers submitted to us, the Citizens' Bank of Louisiana and a large number of other creditors of York & Hoover filed an exception, in which they set out various grounds why the sale should not be confirmed, and conclude by praying that the application of the assignee for the confirmation of the sale be refused and rejected, and that said sale be set aside and annulled.

On the day fixed for the hearing of this rule, the matter of the rule and exceptions thereto were referred by the District Court sitting in bankruptcy to a commissioner, with instructions to ascertain and report upon the validity of the sale, and the priority of the claims; and subsequently the commissioner reported that there was no fraud or collusion in making the sale, and that certain mortgages held by Ober, Atwater & Co. on said "White Hall" and "Home" plantations were the first and best liens on those places respectively, and that the amount due on them was more than the proceeds of the sale.

Thereupon it was ordered by the court, on motion, that the report of the commissioner, if not opposed within three days, be approved and promulgated.

Exceptions were filed to the report of commissioner, and afterwards,—to wit, on January 11, 1870,—the District Court confirmed the sale, but reserved the question of priority of mortgages and liens for further argument. On March 31, 1870, the District Court declared that the mortgages of Ober, Atwater & Co. were the first lien on said plantations, and on the proceeds of the sale thereof, and directed them to be paid in preference to any of the other mortgages set up in the opposition of the creditors of York & Hoover, and directed the money arising from the sale to be paid to Ober, Atwater & Co.

On April 5, 1870, an application was made for a rehearing on the matters embraced in this decision of the court, and on April 27th a rehearing was refused.

The Citizens' Bank, and other creditors of York & Hoover,

on May 9th took an appeal from the order of the court of March 31st, which in effect dates from the refusal for rehearing on April 27th. And on the same May 9th, said Citizens' Bank and other creditors filed in this court a petition invoking its supervisory jurisdiction, under Section 2 of the Bankrupt Act, and praying that the orders and decrees of the District Court above recited be set aside, the sales of said plantations declared null and void, and the same ordered to be resold, and that their mortgages be decreed to have priority.

The case is heard upon two questions:

I. Whether the appeal was taken within the time limited by law; and

II. Whether the case presented by the petitions of the Citizens' Bank and others, was a case for the supervisory jurisdiction of the court, and whether this court has jurisdiction thereof.

First. As intimated during the argument, we are of opinion that if this were a proper case for appeal, the appeal was taken too late. If Sundays are counted, the delay of ten days allowed for the appeal had expired before the appeal was taken. Unless Sundays are expressly excepted in the statute, they are to be counted. The language of Section 8 of the Bankrupt Act is, "No appeal shall be allowed from the District to the Circuit Court, unless it is claimed and notice thereof given to the clerk * * * within ten days after the entry of the decree or decision appealed from." The rule for computing the number of days within which an appeal is allowed is expressly declared by Section 48 of the Bankrupt Act as follows: "In all cases in which any particular number of days is prescribed by this act * * * for the doing of any act, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on Sunday, in which case the time shall be reckoned exclusive of that day also." The fair, and, as it seems to us, unavoidable inference, is that when Sunday is not the last day, it is not to be excluded. Applying this rule, excluding April 27th, the day on which the decree was signed, the time for appeal in this

case expired with May 7th. The appeal not having been taken till the 9th, it was two days too late.

Second. The other question presented is, whether this is a proper case for the supervisory jurisdiction of this court.

By Section 2 of the Bankrupt Act, it is provided that "the Circuit Courts in the districts where proceedings in bankruptcy are pending shall have a general superintendence and jurisdiction of all cases and questions arising under this act, and except where special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity."

"The only construction which gives due effect to all parts of this section is that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the Circuit Court, the appellate jurisdiction defined by Section 8, and, on the other, brings within that category all decisions of the District Court or District Judge at chambers, which cannot be reviewed upon appeal or writ of error under the provisions of that section." Chase, C. J., *in re* Alexander, 3 N. B. R., 29.

By Section 8 of the act, it is provided that appeals may be taken from the District to the Circuit Court in all cases in equity, and writs of error may be allowed to the Circuit Court from the District Court in cases at law, under the jurisdiction created by the Bankrupt Act when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal. Now, according to the decision of Chief Justice Chase, just quoted, unless this case falls under one of the classes provided for in this section, it is a proper case for the supervisory jurisdiction of the court.

First. It is not the case of an assignee who is dissatisfied with the allowance of a claim.

Second. It is not the case of a supposed creditor, whose claim has been wholly or in part rejected. The claims of these petitioning creditors, so far as the record shows, have all been allowed in full. It is true the court has decided that their

claims are not entitled to priority, and that other creditors are; but this is not a rejection of their claims. A creditor's claim is the debt due from the bankrupt to him, and the question of priority of payment is one totally distinct from the question of the allowance or rejection of the claim or debt.

We think this is clear from Section 1 of the act, which extends the jurisdiction of the court to all cases and controversies between the bankrupt and any creditor who shall claim any debt or demand under the bankruptcy;

To the collection of the assets;

To the ascertainment and liquidation of liens, etc.;

To the adjustment of the various priorities and conflicting interests of all parties.

Here is an evident distinction made between the claim of a debt or demand against the bankrupt and priority as to other creditors. A claim of priority is not a claim asserted against the bankrupt, but a right asserted against other creditors.

Third. The matter decided by the District Court on March 31 is not a case at law in which a writ of error would lie. This is clear, and is not disputed.

It remains, then, to consider whether it was a case in equity, in which an appeal might be taken. The phrase "case in equity," in Section 8, in our view, means a suit in equity.

It would seem hardly necessary to cite authority to show what a case or suit in equity is.

Blackstone says: "The first commencement of a suit in chancery is by preferring a bill to the Lord Chancellor in the style of a petition; 'humbly complaining, showeth to your lordship your orator,' etc. This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts, setting forth the circumstances of the case at length; 'and for that your orator is wholly without remedy at the common law,' relief is, therefore, prayed at the Chancellor's hands, and also process of subpœna against the defendant, to compel him to answer, under oath, all the matters charged in the bill. The bill must call all the necessary parties, however remotely con-

cerned in interest, before the court, and must be signed by counsel."

The seventh equity rule, as prescribed by the Supreme Court of the United States, provides that the process of subpœna shall constitute the proper *mesne* process in all suits in equity, to require the defendant to appear and answer the exigency of the bill. Rule 12 provides that whenever a bill is filed, the clerk shall issue process of subpœna thereon, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the issuing thereof.

It is further provided in the equity rules that the appearance day shall be the rule day to which the subpœna is made returnable, provided the defendant has been served with process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable. And it is made the duty of defendant to file his plea, answer, or demurrer to the bill on the rule day next succeeding his appearance.

From what has preceded, it will be seen what is a case in equity, how it is instituted, and how the parties are brought into court, and when they are required to answer.

If we decide that the case before the court is not one for its revisory jurisdiction, we, in effect, decide that the matter which was passed on by the District Court on March 31, was a case in equity. In other words, that a mere motion entered upon the minutes of the court without a prayer for relief, without a prayer for process, is a bill in equity; that a notice published three times in a newspaper is service of process, and brings parties into court as if served with a subpœna in chancery; and that a decree rendered upon such rule, when only a portion of the parties referred to in the rule make any appearance whatever; when only a part of them file any response to the motion, and that in the way of an exception, and not sworn to; when no decrees, *pro confesso*, are taken against those who do not appear, is a final decree in a case in equity, from which, under the Judiciary Act, an appeal lies to the Circuit Court. The mere

statement of the proposition is its own refutation. Nor do we think the case made by the petition of Slocomb, even if it was held to give character to the proceeding and decision which petitioning creditors seek to review, is any more of a case in equity than the motion of the assignee, Norton, by his solicitor, Stone. There is scarcely anything in the petition which assimilates it to a bill in equity. It is, in fact, nothing more than a motion in writing. It simply prays that "said Ober, the said assignee, and said Girardy & Co., show cause, on a certain day, why the said sales should not be set aside as void, and, until the hearing, that the parties named be enjoined from taking any steps towards perfecting said sales." Only three or four of the persons interested in the question are named in the petition—the great mass of them are left out entirely; no prayer of process; no demand for answer under oath; no service of process, and, in fact, scarcely any of the common incidents of a bill in equity, are to be found in this petition. To call it a bill in equity, or the proceeding a case in equity, it seems to us is an entire misapprehension of the meaning of the terms.

But it is insisted that the setting aside a sale for fraud and determining the priorities of liens are matters of purely equitable cognizance, and therefore the proceeding sought to be reviewed is a case in equity, from which appeal lies.

Courts of law frequently pass upon questions purely equitable, on motion or rule; but the nature of the question has never been held to make such motion or rule a case in equity. It is a very common practice for courts of law, on motion, to set aside sales made by a sheriff on execution, on account of some fraud or unfairness on the part of the sheriff or purchaser; yet he would be a bold man who would insist that such a motion was a case in equity. When money is brought into court, the proceeds of a sale on execution, courts of law do not hesitate, on motion, to direct how the money shall be distributed, assuming to pass upon the priorities of claimants to the fund; yet it has never been supposed that, by so doing, they were rendering a decree in chancery, or that the motion to distribute the fund according to the rights of the parties, made a case in equity.

These two things, passing upon the validity of a sale, and directing the distribution of the fund arising therefrom, on motion or rule to show cause, are precisely what the District Court did, and we do not think the motion was a case in equity, or the ruling of the court a decree in equity. It was the simple exercise of a power incident to courts of law, as well as equity, to regulate the proceedings in a case pending before it, to control its own process, and to distribute funds brought into court.

Our general view of the whole subject is this. The proceedings in bankruptcy, from the filing of the petition to the discharge of the bankrupt and the final dividend, is a single statutory case or proceeding. In the conduct of the case a large number of questions may arise. Before the assets of the bankrupt can be collected and distributed, it will frequently occur that the assignee or a creditor is driven to a regular bill in equity or an action at law. In these cases the Circuit Court has no supervisory jurisdiction, nor has it where the claim of a supposed creditor has been rejected in whole or in part, or where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal. But all other cases and questions arising in the progress of a case of bankruptcy through the Bankruptcy Court, whether the matter is of legal or equitable cognizance, and when the matter is not the subject of a regular suit in equity or at law, or is the allowance or disallowance of a claim, fall within the supervisory jurisdiction of the court, and may, upon bill, petition, or other proper process of any party aggrieved, be heard and determined in the Circuit Court as a court of equity.

We think the motion to dismiss the petition of review in this case not well taken. It is, therefore, overruled.

The appeal, we think, is not well taken, both because not taken in time, and because the matter decided was not the subject of appeal. The appeal is, therefore, dismissed.

Mr. Marr for the motions.

Randolph, Singleton & Bowne, and *Hyams & Jonas*, opposed.

UNITED STATES DISTRICT COURT—E. D. ARKANSAS.

The inability to pay debts in the ordinary course of business, as merchants in trade usually pay them, constitutes insolvency within the meaning of the Bankrupt Act.

Where a party cannot pay his debts in the ordinary course of business, and knows that he cannot, he will be held to have had knowledge of his insolvency.

The necessary effect of a conveyance to creditors in satisfaction either in whole or in part of a pre-existing debt, by one who knows that he is insolvent, is a preference in fraud of the Bankrupt Act, and he must be held to have intended this as a necessary result of his action.

Ignorance of the law cannot avail creditors who are possessed of facts that show the insolvency of the debtor, and a preference received under such circumstances is fraudulent and void.

Where a transaction that contemplates the securing of a debt is out of the ordinary course of business, the Bankrupt Act declares it to be *prima facie* fraudulent, and the *onus* of showing that it is not so, is cast upon the defendant.

MARTIN, *Assignee, etc., v.* TOOF, PHILLIPS & Co.

CALDWELL, J.—W. P. Haines & Co., a firm composed of W. P. Haines and C. E. Chetlain, were retail merchants doing business at Augusta, in this State.

On the 29th day of February, 1868, they filed their petition, praying to be adjudged bankrupts, and on the 22d of May, 1868, they were so adjudged, and the plaintiff appointed assignee.

On the 18th day of January, 1868, the bankrupts conveyed to the defendants, for the consideration of one thousand eight hundred and seventy-six dollars and eighty-four cents, to be credited on a debt due from the bankrupts to the defendants, an undivided half of a parcel of real estate owned by the bankrupts as partnership property. At the same time the bankrupts assigned to F. M. Mahan, one of the members of the firm of Toof, Phillips & Co., a title bond they held for certain other real estate in the town of Augusta, on which the bankrupts had made valuable improvements.

This title bond was assigned to said Mahan for the consideration of seven thousand dollars, also to be credited on the indebtedness of the bankrupt to Toof, Phillips & Co. There was some seven hundred and forty dollars of the purchase-

money still due on said property, and this said Mahan paid and procured a conveyance to himself from one Hough, the owner of the fee of the property.

The plaintiff charges that these conveyances were made in fraud of the Bankrupt Act, that the bankrupts were insolvent at the time they made them; that they were made with intent to give a preference to the defendants, and that the defendants at the time said conveyances were made, knew, or had reasonable cause to believe the bankrupts were insolvent, and that said conveyances were made in fraud of the Bankrupt Act. Plaintiff also charges that the assignment of the title bond to F. M. Mahan, one of the defendants, was in fact for the use and benefit of the defendants, and for the purpose of securing the said property, or its value, to the defendants, in fraud of the rights of the other creditors of the bankrupts, and that this purpose and intention was well known to, and participated in, by said Mahan.

In determining this case, the following inquiries arise:

I. Was the firm of W. P. Haines & Co. insolvent at the date of these conveyances?

II. Were these conveyances made with a view to give a preference to defendants over the other creditors of the bankrupts?

III. Did the defendants have reasonable cause to believe the bankrupts were insolvent?

First. That the bankrupts were, in fact, hopelessly insolvent at the date of this transaction, cannot be questioned, as will be seen from the following statement of their liabilities and assets:

Indebtedness of firm at date of conveyances, as per schedules on file and referred to in deposition of Haines.....	$55,853 01
Individual indebtedness of members of firm:	
Chetlain.....	8,850 00
Haines.....	105 00
Total indebtedness at date of conveyances.....	$59,808 01

Amount brought forward		$59,308 01
Assets of firm as per schedules	$31,851 41	
Stone house and lot, say	1,800 00	
Dwelling houses of each partner, say $2,000 each	4,000 00	
		$27,651 41
Excess of liabilities over assets		$31,656 60

About eighteen thousand dollars of the assets consisted of notes and accounts, most of which are shown to be worthless.

Nearly all of the remaining assets, as shown by bankrupts' schedules, consisted of personal property, on which defendants held a mortgage, and the real estate embraced in the bankrupts' conveyances to defendants. The stock of goods on hand invoiced, as shown by the schedules, two thousand six hundred dollars. And this was the condition of the bankrupts' property at the date of the conveyances to defendants. Chetlain and Frisbie both testify that the bankrupts sold no goods and did no business after that time.

The indebtedness of the bankrupts is stated by some of the witnesses to have been from thirty-one thousand to thirty-five thousand dollars. How this discrepancy occurs between the statement of indebtedness by the witnesses and the statement of the indebtedness by the bankrupts in their schedules, does not appear, and is not material, as, taking either as correct, the bankrupts were hopelessly insolvent.

All the bankrupts' indebtedness, with slight exceptions, was in the shape of commercial paper, and with the exception of a debt owing to Walker Bro. & Co., amounting only to some one thousand dollars, was overdue and unpaid at the date of this transaction.

Creditors had pressed the bankrupts for payment of their debts without results; their stock of goods had been levied on, and their store closed by the sheriff by virtue of an execution issued on a judgment against one of the bankrupts; they had contemplated going into bankruptcy, and during the fall and winter of 1867–8, they only paid (excluding payments to

defendants), five hundred dollars, on an indebtedness of over fifty thousand dollars then overdue.

The inability to pay debts in the ordinary course of business, as merchants in trade usually do, constitutes insolvency within the meaning of the Bankrupt Act.

The bankrupts could not pay their debts in the ordinary course of business, and they knew it, and they must, therefore, be held to have had knowledge of their insolvency.

Second. Knowing they were insolvent and unable to pay their debts, they conveyed to defendants a large portion of their property, in part satisfaction of a pre-existing debt.

The necessary effect of this conveyance was to give the defendants a preference, and they must be held to have intended the necessary result of their action.

The witness Frisbie says, that "in the latter part of December, 1867, I assisted Mr. Haines in making up his balance-sheets; the result was that their available assets was not sufficient to pay their indebtedness."

Third. The defendants not only had reasonable cause to believe the bankrupts insolvent, but they had actual notice of the fact.

Chetlain, in his deposition, says: "I told Mr. Mahan we could not pay out," and the same witness says that Mahan was in Augusta during the time their goods were levied on, and that they "had an interview with Mr. Mahan on the subject."

And the witness McCurdy swears that some time in December, 1867, defendants sent him for collection a note against the bankrupts; that he was unable to collect it, and he then says: "I wrote to Toof, Phillips & Co., that I thought they had better look to their interests, as my conviction was that it was doubtful about their being able to collect their debt from William P. Haines & Co. I think shortly after writing this letter that a representative of the house came round to look after the matter. I think it was Mr. F. M. Mahan."

The defendants, in their answer, say: "It is true, as alleged in said bill, that at the time of the said several transactions,

said Haines & Co. owed a large amount of debts, but that they were then insolvent was untrue; but, on the contrary, it is true that at the time aforesaid, said Haines & Co. had available assets in excess of their indebtedness, to the amount of sixteen thousand dollars; that while it is true said Haines & Co. did owe Toof, Phillips & Co., and they were desirous to secure their debt, yet they deny they did so, or that they made any effort to secure the same regardless of the rights of other creditors; but at the time aforesaid, said Haines & Co. were not only able to secure said debt of defendants, but also to make good and secure all their other liabilities."

Here is a direct admission of knowledge of the bankrupts' indebtedness, and the averment that the bankrupts were able to "make good and secure their other indebtedness," is fairly tantamount to a confession that they could not pay in the ordinary course of business, as merchants usually do. They had positive knowledge the bankrupts had not done so in their case, but all doubts on this point are put at rest by the defendants' answer to the first interrogatory of the bill, in which they say: "At the time of making of the transfers, defendants do not believe said Haines & Co. were able to pay their debts in money, but they were able to do so on a fair market valuation of the property they owned, and of their assets generally."

Here is a direct confession of a fact, that in law constitutes insolvency, and it is idle for defendants to profess ignorance of the insolvency of the bankrupts in the face of such a confession.

If the bankrupts could not pay their debts in the ordinary course of business, that is in money, as they fell due, they were insolvent; and if defendants did not know this constituted insolvency within the meaning of the Bankrupt Act, it was because they were ignorant of the law, and that ignorance can avail them nothing in this suit; and their denial of knowledge of the insolvency of the bankrupts, must, in view of their own confessions, and the overwhelming proof in the case, be held to be a denial of the law rather than the fact.

The transactions themselves being out of the ordinary course

of business, the Bankrupt Act declares them *prima facie* fraudulent, and casts on the defendants the *onus* of showing they were not so. They not only fail to rebut this *prima facie* case, but their own admissions, and the proofs in the case show that the transactions were, in fact, frauds upon the Bankrupt Act.

The effort to make it appear that the transfer by the bankrupts of their homesteads to Mahan was a *bona fide* transaction, and that it was entered into without any view or expectation that the consideration Mahan was to pay for the property was to apply as a credit on the indebtedness of the bankrupts to the defendants is negatived, by every fact and circumstance appearing in the whole case.

Chetlain swears positively that it was "expressly understood between me and Mr. Mahan that the drafts (Mahan's drafts for the price of the property) should go to our credit."

Haines swears to same effect. The pretense that Haines & Chetlain were at liberty to make what disposition they pleased of Mahan's drafts on Toof, Phillips & Co. for the seven thousand dollars agreed to be paid for the property, and that their transmission to Toof, Phillips & Co. by Haines & Chetlain, with instructions to place to the credit of Haines & Co. was an agreeable surprise, is too incredible for belief.

It is obvious that these drafts never would have been paid if Haines & Chetlain had transferred them to any other of their creditors, or if they had demanded the money on them.

The claim that Mahan made this purchase in good faith in his own name and for himself as "an investment," cannot be supported.

The property which he would have it appear he purchased as an investment on private account for seven thousand dollars, to be paid in cash, is shown by the testimony of Chetlain to have been worth only four thousand dollars, and by the testimony of Hamblet to have been worth only three thousand five hundred dollars, and it is valued by the bankrupts in their schedules at four thousand dollars, and we may reasonably suppose its value was not under-estimated by them.

The property at the same time was subject to a lien of seven

hundred and forty dollars for the original purchase-money. That some inducement other than a desire to make "an investment" must have operated on Mahan to have induced him to give seven thousand dollars for property worth at most but four thousand dollars, with an incumbrance on it for seven hundred and forty dollars, is a conclusion which the mind cannot resist.

What was that inducement? But one answer can be given to this question, it was to secure this property for his firm on account of the bankrupts' indebtedness to them; and the testimony of the witness, Mahan, must be based rather on the form of the transaction as evidenced by the papers than on the actual intention and purpose of the parties.

That he expected to pay to his firm seven thousand dollars in cash for taking up the drafts he drew for the agreed price of this property, I do not believe, nor do I believe he could or would so swear. It is true he says "the amount was charged up to him on the books of the firm." So was the title-bond assigned to him and the deed made to him, but equity pays no regard to the forms resorted to by parties in fraud of the law.

Chetlain and Haines both swear, and every fact in the case shows that the inducement to this purchase on the part of Mahan, was to secure the value of this property to his firm; and on the part of the bankrupts, it was to give a preference to the defendants and to obtain further advances. These advances Mahan promised to make in order to secure these conveyances, but as soon as he obtained the conveyances the defendants refused to make any further sales or advances to the bankrupts.

Mahan admits he "agreed at the same time to continue selling them goods on the usual time, same as we had been doing before, and *we continued to do business with them as usual until some time in the following month.*" If he means to be understood as saying defendants sold the bankrupts' goods on credit, or made any advances to them in any manner after the date of these conveyances, he is contradicted by the positive testimony of Haines & Chetlain, and by Exhibit "A" to his own deposition, which contains a full statement of defendants'

dealings with the bankrupts, and shows that defendants did not sell the bankrupts any goods or give credit to them in any way whatever after the date of these conveyances.

It must be recollected that in this case the interests both of the bankrupts and defendants are adverse to the assignee, for if the plaintiff succeeds it can only be on the ground that the bankrupts made a preference in fraud of the Bankrupt Act, which would preclude them from obtaining a discharge, and the defendants, of course, are interested to the value of the property. It is not, therefore, very remarkable that they should strive to avoid a conclusion leading to such results. As the evidence shows a state of facts from which the law will infer and declare insolvency and an intent to prefer, it is but fair to presume their denials were intended to repel a charge of actual moral fraud, and that they were made in ignorance of the legal effect of their action.

No one who will read carefully the pleadings and proofs in this case, can resist the conclusion that this transaction was a bold effort of an enterprising and cunning creditor, to possess himself of the bulk of the property of the bankrupts in fraud of the Bankrupt Act and the other creditors of the bankrupts.

The conclusions reached on the law and the facts of this case, are fully supported by the ruling of this court in the case of *Rison*, assignee, v. *Knapp*, 4 N. B. R., 349, and in the following cases: *in re* Black and Secor, 1 N. B. R., 353; *Merchants' Nat. Bank* v. *Truax*, *Ib.*, 545; *in re* Arnold, 2 N. B. R., 160; *in re* Gay, *Ib.*, 354; *Haughey*, assignee, v. *Albin*, *Ib.*, 399; *Wilson*, assignee, v. *Stortz et al.*, *Ib.*, 468; *Farrin* v. *Crawford et al.*, *Ib.*, 602; *in re* Randall and Sunderland, 3 N. B. R., 18; *Ahl et al.*, v. *Thorner*, *Ib.*, 118; *McDonough et al.*, v. *Rafferty*, *Ib.*, 221; *in re* Kingsbury *et al.*, *Ib.*, 317; *Graham*, assignee, v. *Stark and others*, *Ib.*, 358; *Scammon*, assignee, v. *Cole et al.*, *Ib.*, 393; *Campbell*, assignee, v. *Traders' Nat. Bank*, 3 N. B. R., 498.

The mortgage on the personal property and the prospective crop of the bankrupts, executed to secure the defendants for advances made, and to be made, to aid in the production of a

cotton crop, was executed many months before they were adjudged bankrupts, and so far as the proof shows, before they were insolvent, or the defendants had reason to believe them to be so, and so far as relates to the property mentioned in this mortgage, the bill is dismissed. As to the real estate conveyed by the bankrupts to Mahan, and to the defendants, a decree will be entered for the complainant resting the title of the property in him.

The defendants should be repaid the seven hundred and forty dollars paid out by them to perfect the title to this property, and the decree will require the complainant to pay that sum to them, after deducting therefrom the reasonable rents and profits of the property during the time they have had the possession. A master will be appointed to take and state the account.

On appeal to the Circuit Court the judgment in this case was affirmed by Miller, J.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

When a bill in equity was brought to recover from the defendant money alleged to be due to the plaintiff, on an agreement made by the defendant with the bankrupts to pay them, as salaries for their services as clerks, certain portions of the net profits realized from the business carried on by defendant, and for an accounting, the court decided that a plea as to the statute of limitations was not warranted by the 2d Section of the United States Bankrupt Act of 1867, in the above case.

Plea overruled with costs, and defendant allowed to answer the bill.

SEDGWICK, *Assignee, etc., v.* CASEY.

BLATCHFORD, J.—This is a bill in equity to recover from the defendant money alleged to be due to the plaintiff on an asset of the bankrupts, namely, an agreement made by the defendant with the bankrupts to pay them, as salaries for their services as clerks, certain portions of the net profits which should be realized from the business carried on by the defendant, and in prosecuting which the bankrupts were so employed as clerks, such payments to be made as soon after the terminations of their clerkships, as there should be funds sufficient to discharge

the liabilities of the business and pay such profits. The agreement provided, that the bankrupts should have no interest in the stock or property of the defendant's business. The bill prays for an account by the defendant, he having all the books and papers from which such profits can be ascertained, and for a discovery of such books and papers, and for the payment of what shall be found due on such accounting.

The defendant pleads to the bill that the cause of action did not accrue within two years before the commencement of the action, and that the defendant did not at any time within two years after the cause of action accrued to the plaintiff against the defendant, make any acknowledgment or promise to come to any account for, or to pay, or in any way to satisfy, the plaintiff in any sum or sums of money, for or by reason of anything alleged in the bill.

This plea of the statute of limitations is evidently supposed to be warranted by the 2d Section of the Bankrupt Act, which provides that no suit at law or in equity shall in any case be maintainable by an assignee in bankruptcy against any person claiming an adverse interest touching any property or rights of property of the bankrupt, transferable to or vested in such assignee, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for the assignee. This suit does not fall within that provision. It is a suit merely to collect a debt or enforce the payment of money due on a contract. The plaintiff does not claim an interest adverse to the defendant in or touching any property or right of property of the bankrupts, transferable to or vested in the plaintiff as their assignee, nor does the defendant claim any interest adverse to the plaintiff in or touching any such property or right of property. The defendant claims no ownership of or title to the debt or contract which the plaintiff is seeking to enforce against the defendant. Nor does the plaintiff claim any ownership of or title to any specific property or right of property as having passed to him by virtue of his appointment, which the defendant also claims to own. Nor does the defendant claim any ownership of or title to any specific

property which belonged to the bankrupts. The limitation of two years applies only to such controversies. Moreover, it applies only to controversies of which, by the 2d Section, the Circuit Court of the district has concurrent jurisdiction with the District Court of the same district. The Circuit Court of this district would have no jurisdiction of this suit.

The plea is overruled with costs, and the defendant is allowed to answer the bill within twenty days.

T. M. North, for the plaintiff.

A. R. Dyett & G. A. Seixas, for the defendant.

UNITED STATES CIRCUIT COURT—E. D. WISCONSIN.

A mortgage of personal property being, under the laws of Wisconsin, ineffectual to pass after acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee who had taken possession.

Though a mortgage be valid as to property then in possession, in a case where a mortgage subsequently given to cover the property afterwards acquired, would have been void under the Bankrupt Law, the authority given in the mortgage does not enable the mortgagee, by taking possession of such property, to hold it as against the assignee. This would be, in effect, a preference, and against the spirit of the act.

A mortgagee in possession being entitled to retain all property upon which his mortgage was valid, the expenses of a sale of such property by order of the District Court should not be paid out of the funds in court *pro rata* with other expenses in bankruptcy.

A chattel mortgage "of all the goods and merchandise" in a store here held not to include fixtures.

In re Eldridge.

Spencer Eldridge and Leslie R. Treat were merchants engaged in business in Janesville, in this State, and on the 1st day of April, 1867, Robert B. Treat loaned to Eldridge & Treat two thousand dollars. Eldridge & Treat continued business until November 21, 1867, when L. R. Treat sold out his interest to Fenton F. Stevens. Eldridge & Stevens became responsible for the debts of Eldridge & Treat, and among the rest for the debt due Robert B. Treat. On the 12th of March, 1868, Stevens sold his interest in the firm of Eldridge & Stevens to Eldridge. Robert B. Treat agreed to release

Stevens, and Eldridge agreed to pay Robert B. Treat and the other debts of Eldridge & Stevens. Eldridge, on the 13th of March, 1868, gave Stevens a mortgage for three thousand two hundred dollars on his stock. At this time the stock was estimated to be worth between eleven and twelve thousand dollars. On the same day Eldridge gave a second mortgage to R. B. Treat for the sum of two thousand dollars. These mortgages purported in terms to cover all after acquired property.

On the 8th of May, 1868, Eldridge gave Stevens and Treat new mortgages intended to cover goods obtained since March 12. These last mortgages made no reference to any after-acquired property. Between the 8th of May and the 15th of October, 1868, Eldridge had purchased and put into the store at Janesville a quantity of goods invoiced at six thousand six hundred and forty-four dollars and forty-five cents. On the last named day, Treat and Stevens took possession, under their mortgages, of all the goods in the store. On the 19th of October, 1868 a petition in bankruptcy was filed against Eldridge, and on the 30th of October, of that year, he was adjudged a bankrupt by decree of the District Court for this District. The District Court decided the mortgages were valid on all the goods in the store at the time the mortgagees took possession. The property was sold under the order of the District Court and the proceeds paid into court.

There being no question made but that the mortgage of Stevens was prior to that of R. B. Treat, the District Court decided that out of the money in court there should be paid, in the first place, all the costs and expenses connected with the proceedings in bankruptcy and the sale of the goods. These were quite large. Secondly, the mortgage of Stevens, and lastly, whatever remained was to be paid upon the mortgage of R. B. Treat. There was not, in fact, enough property, unless what was afterwards acquired was included, to cover the mortgages. Some other facts are stated by the court.

Drummond, J.—The questions in this case must depend in part upon the law of Wisconsin. The 14th Section of the

Bankrupt Law declares that no mortgage of any goods or chattels made as security for any debt or debts in good faith, and for present considerations, and otherwise valid, and duly recorded pursuant to any statute of the United States, or of any State, shall be invalidated or affected by the Bankrupt Law.

Under the law of Wisconsin, in order to render a mortgage of chattels valid, the mortgagee must be in possession, or the mortgage must be recorded in the manner particularly pointed out in the statute.

The Supreme Court of Wisconsin has held in *Chenowith* v. *Tenney*, 10 Wisconsin R., 397, and in *Sigle* v. *Phelps*, 20 Wisconsin R., 398, that mortgages of personal property do not cover what is afterwards acquired, that, as to such property, it is in the nature of a revocable license to take possession.

The point is not entirely free from difficulty, but, on the whole, my opinion is that the mortgages of the 13th of March, and the 8th of May, 1868, for the property actually in possession of the mortgagor at the time, are valid under the law of Wisconsin. They appear to have been executed in good faith, and for a valuable consideration, and were duly recorded. I see no good reason, therefore, for disturbing the decree of the District Court on that point. But, as to the property afterwards acquired, there was not a valid mortgage, but only authority to take possession, and the rights of creditors, under the Bankrupt Law, must depend upon its effect upon the property at the time the act was done, which might be supposed to operate as a transfer. This was the taking possession under the license contained in the mortgage. Then Eldridge was insolvent and the mortgagees must have known it, or had reason to believe it. The 35th Section of the Bankrupt Law declares, in substance, that if any insolvent person, within four months before proceedings in bankruptcy are commenced by or against him, and in order to give a preference to a creditor, makes a transfer of his property, and the person to whom it is made has reasonable cause to believe him insolvent, the transfer shall be void as to general creditors. It is true in this case there was not, in one sense, a transfer made on the 15th of October, 1868,

because the instruction or authority to take possession of after-acquired property, as the Supreme Court of Wisconsin construes it, was given in the mortgages executed some months before. But it is not competent for a party to give this authority in relation to property which he may afterwards acquire, and thus prefer a creditor who shall take possession when he is known to be insolvent, and thus avoid the effect of the Bankrupt Law because, literally, he has not made a transfer. That, certainly, would be a facile method of evading the scope and spirit of the law. In legal effect it was a transfer within the meaning of the law. It was a continuing act from the date of the authority to the taking possession, the last act being the consummation of the transfer, and in this instance the transfer giving a preference, the mortgagor being insolvent, and the mortgagees knowing the fact. It must be treated as if a mortgage were made of the after-acquired property at the time the mortgagees took possession. It was in substance, then, the case described in the 35th Section, and as against the assignee of Eldridge, representing the general creditors, was void.

All of the costs of the bankruptcy proceedings and expenses of the sale were, by decree of the District Court, first to be paid out of the proceeds of the sale of the goods. The mortgagees should not have been taxed with the costs of the proceedings in bankruptcy. To the goods included in their mortgages, they had a legal right. Over the goods not included, the District Court had complete control, for the benefit of the general creditors. It is only the fund within the legitimate power of the court, that should have been charged with the costs and expenses of the proceedings in bankruptcy. But we have to deal with the case as it stands. The goods of the mortgagees have been converted into money, and that is now in court, and it is not inequitable to charge them with what would have been reasonable expenses for the sale of their goods. If they had retained possession of them, this charge they would have been obliged to meet, and to that extent the claim on the fund in court will be allowed, as it is not insisted that the goods were not fairly sold.

Fortunately, in this case there is no difficulty in determining the amount and value of the goods included in the mortgages, and what were afterwards acquired, and the proceeds of the sale in each case.

That part of the decree of the District Court, deciding that the after-acquired property was covered by the mortgages, and that all the expenses of the bankruptcy proceedings and of the sale of the goods should be first deducted out of the money in court, will, therefore, be modified, and the proceeds of the sale of the after-acquired property will be directed to be paid over to the assignee, deducting the sum of one hundred dollars, which are allowed as a proper charge for selling that part of the property. There is a question made as to the fixtures in the store at the time the mortgages were executed. In the mortgage to Stevens the property is described as "all of the goods and merchandise now in the store." In the mortgage to Treat it is described as "all of the stock of goods and merchandise now in the store, *and* fixtures." It was understood, throughout, that the mortgage of Stevens should take priority over that of Treat, and it was first recorded, and therefore it becomes necessary to decide whether Stevens' mortgage included the fixtures. They were of the value of two hundred and sixty dollars. Under some circumstances, the term "goods and merchandise in the store," might, perhaps, be presumed to include the fixtures there, but here there are facts which seem to limit the construction of the language in the Stevens' mortgage to the goods and merchandise, proper, in the store. The mortgages were written by the same person, it is to be inferred under special instructions from the mortgagor, and in the one the fixtures were omitted, and in the other the description of the property is substantially the same, save that the fixtures are added. The mortgages were executed together on the 13th of March, and the fair inference is, that the Stevens' mortgage was not intended to include the fixtures.

Messrs. Conger & Sloan, for Stevens.

Messrs. Jackson & Ebberts, for Treat.

Messrs. Palmer & Cassidy, for assignee.

MAINE SUPREME COURT.

A discharge duty granted under the United States Bankrupt Act of 1867, when pleaded in bar to the further maintenance of action for prior indebtedness cannot be impeached in this court for any cause which would have prevented the granting of it, under Section 29, or been sufficient ground for annulling it under Section 24.

The authority to set aside and annul a discharge in bankruptcy, conferred upon the federal court by Section 34, is incompatible with the exercise of the same power by a State Court; and the former is paramount.

COREY *et al. v.* RIPLEY.

ON Report.

Assumpsit on account annexed to the writ dated January, 22, 1868.

At the April term, 1869, the defendant pleaded in bar of the further maintenance of the suit, a discharge in bankruptcy in the prescribed form, duly granted under the United States Bankrupt Act of 1867, and dated March 9, 1869, releasing him from all debts, etc., which existed on May 30, 1868, when he filed his petition.

The plaintiff, by his replication in due form, substantially alleged that the discharge is invalid for the reasons mentioned in Section 29, and which would have prevented the granting of the discharge had the same been objected to in the United States Court and the allegations proved.

Thereupon it was agreed to submit the case to the law court, with the agreement that if the discharge in bankruptcy cannot be impeached in this case, for any cause which, under said act, would have prevented the granting of the discharge, or would have sufficient ground for annulling the discharge by the United States Court as provided in said act, judgment is to be rendered for the defendant for his costs in the law court only.

Shepley & Strout, for the plaintiffs.

The action was commenced by personal service upon the defendant long before his commencement of proceedings in bankruptcy, whereby this court obtained full jurisdiction. While the cause was pending in this court, the defendant pleaded his

discharge in bar to the further maintenance of the suit, and the plaintiff replied the causes mentioned in the United States Bankrupt Act of 1867, Section 29. Is the discharge conclusive in a court having jurisdiction of the person and subject-matter of the suit? When a court has jurisdiction, it has a right to decide every question arising in the cause before it. *Peck* v. *Jenness*, 7 How., 618, 624.

The United States District Court has exclusive jurisdiction of "all suits and proceedings in bankruptcy." Suit at bar is not a proceeding in bankruptcy, and, although the plea of bankruptcy was interposed by the defendant, this court is as competent to entertain and judge of that plea as of any other. *Peck* v. *Jenness*, *supra*; *Smith* v. *McIver*, 9 Wheat., 632; *Wallace* v. *McConnell*, 13 Peters (S. C.), 136; *The Robert Fulton*, 1 Paine, 621; *Ex parte Robinson*, 6 McLean, 355; *Stearns* v. *Stearns*, 16 Mass., 167, 171.

This court obtained jurisdiction prior to the commencement of the defendant's proceedings in bankruptcy, and that jurisdiction must extend to the final determination of all questions arising in the usual course of proceedings in the case. *Beekman* v. *Wilson*, 9 Met., 434; *Judd* v. *Ives*, 4 Met., 401; *Mallett* v. *Dexter*, 1 Curtis, C. C. R., 178; *Kittredge* v. *Emerson*, 13 N. H., 227.

The provisions of Section 21, show that the jurisdiction of the State Court is not devested by the commencement of proceedings in bankruptcy. Having jurisdiction, plaintiff will have judgment unless a valid defence is shown, which is attempted by putting in discharge.

But by Section 29, no discharge "shall be valid if the bankrupt has sworn falsely," etc. Not that the discharge shall be invalid, if so declared by the court granting it, in a proceeding contemplated by Section 34. By Section 34 the discharge can be annulled only in certain cases, and only where the petitioning creditors had no knowledge of the cause of opposition, etc., at the time the discharge was granted. There is no such limitation or qualification in Section 29.

If this court has jurisdiction to entertain the plea, it may also

determine the validity and sufficiency of it; otherwise the parties must resort to a foreign tribunal to settle that question.

The discharge is *prima facie* valid; and when pleaded (if not annulled) the *onus* is upon him who attempts to impeach it, to establish some one of the causes mentioned in Section 29.

By Section 34 a method is provided whereby a creditor may, within two years, have a rehearing in the District Court, and cause the discharge to be set aside and annulled, so that it could not be pleaded. Section 34 covers the cases where, without negligence, creditors had failed to oppose the granting of the discharge in the manner provided by Section 31.

There is no provision providing that the discharge shall be conclusive when pleaded in a State Court, and none which deprives this court of its jurisdiction to determine the validity of this plea, same as any other matter in defence.

The discharge operates as a "release" when "duly granted under the act," "with the exceptions aforesaid." The discharge is not "duly granted" when the bankrupt has "sworn falsely," or has been guilty of any of the acts which the law pronounces to be a fraud on its provisions.

The power to pronounce judgment upon the validity of the discharge is inherent, and forms a constituent element in the court. It is not derived from the Bankrupt Act, but from the Constitution. The analogies to be drawn from the decisions under the acts of 1800 and 1841 are in favor of this view.

A discharge, duly pleaded and admitted by the replication or demurrer to be in due form and otherwise valid, is made, by the paramount law of Congress, a complete bar, and consequently defeats all liens and attachments which are mere securities for the satisfaction of a judgment to be recovered, but which in this case can never be recovered.

Davis & Drummond, for the defendant, elaborately argued the following propositions:

First. Proceedings in bankruptcy are in a court of record; and all decrees and judgments therein are of the nature of

judgments *in rem*, and conclusive upon all, whether parties or otherwise. *Shawhan* v. *Wherritt*, 7 How., 627 (17 Curtis, S. C. R., 328, 330, 331). Judgments *in rem* are conclusive upon everybody. *Voorhees* v. *U. S. Bank*, 10 Peters, 449, and cases *infra*. *Hunt* v. *Columbian Ins. Co.*, 55 Maine, 290, and cases *infra*. No defences which might have been interposed to prevent the decree granting the discharge can be admitted now to defeat it. *Rankin* v. *Goddard*, 55 Maine, 389.

Second. The act of 1800 expressly provided that the discharge might be impeached by proving the same facts as would have prevented the granting of it, had they been shown in the court of bankruptcy.

Third. So with act of 1841, Section 4. The discharge granted under that act might be impeached "in all courts of justice," for the causes and in the manner therein stated; but for no other cause and in no other manner. *Chadwick* v. *Starrett*, 27 Maine, 138. See also *Beekman* v. *Wilson*, 9 Met., 434; *Coates* v. *Bush*, 1 Cush., 564; *Humphreys* v. *Sweet*, 31 Maine, 192.

Fourth. The exceptions to the conclusiveness of the discharge, made in the acts of 1800 and 1841 are not in the act of 1867. The methods given for impeachment in first two and not in the last, but a different method is provided, which alone can be adopted.

Fifth. The discharge is final unless the plaintiff can bring himself "within an exception in the act."

Sixth. In reply: no question of jurisdiction or ousting of jurisdiction is involved. Defendant has pleaded a judgment which has discharged the plaintiff's original cause of action. The defendant desires to plead matters to avoid, which might have been pleaded to prevent, that judgment.

A man is sued for goods furnished his wife at a certain date; he pleads in bar a divorce before that date. If plaintiff admits notice, jurisdiction, and decree of divorce, but replies that the divorce ought not to have been granted, because the libellant had been guilty of adultery, such replication would be no answer.

Corey et al. v. Ripley.

DICKERSON, J.—Assumpsit on account annexed to the writ. The defendant pleaded a discharge in bankruptcy in bar of the further maintenance of this suit. The plaintiff alleged, in his replication, that the defendant's discharge is invalid for the reasons set forth in Section 29 of the Bankrupt Act of 1867.

According to the agreement of the parties, the law court is to decide whether the defendant's discharge in bankruptcy can be impeached in this court for any cause which would have prevented the granting of the discharge, under the Bankrupt Act, or would have been sufficient ground for annulling the discharge in the United States Court, as provided in that act.

Section 29 of the Bankrupt Act of 1867, specifies the grounds which will prevent the granting of a discharge, or render one invalid when granted. After enacting that a discharge duly granted under this act shall be a full and complete bar on all suits, * * * and that the certificate of discharge shall be conclusive evidence of the fact and the regularity of such discharge, Section 34 contains the following proviso: "Any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge, on the ground that it was fraudulently obtained, may, at any time within two years from the date thereof, apply to the court which granted it, to set aside and annul the same."

The question presented in this case did not arise under the Bankrupt Act of 1841, as that act made the bankrupt's discharge conclusive "in all courts of justice" (Section 4), unless it should be impeached for one of the causes stated in the act itself, and no tribunal was designated for testing its validity. This provision of the act of 1841, however, was held to restrict the action of courts, in impeaching the validity of the discharge of a bankrupt, to the causes and the manner therein specified. *Chadwick* v. *Starrett*, 27 Maine, 138; *Coates* v. *Bush*, 1 Cush., 564; *Humphrey* v. *Sweet*, 31 Maine, 192.

By parity of reasoning, the mode of impeaching the validity of a discharge prescribed in the act of 1867, excludes all other modes; and such, we think, is the true construction of that act.

The proceedings in bankruptcy are statutory proceedings. The powers exercised and the remedies provided in bankruptcy are given by statute. The impeaching tribunal is specified, and this designation, according to well established principles of interpretation, forms a part of the remedy, and excludes all others. *Dudley* v. *Mayhew*, 3 N. Y., 10; *Stevens* v. *Evans*, 2 Barr, 1157; *City of Boston* v. *Shaw*, 1 Met., 130.

The act of 1841 made the bankrupt's discharge "full and complete evidence of itself, in favor of such bankrupt * * * in all courts of justice * * * unless the same should be impeached," for the causes and in the manner stated. That act, moreover, contains no such provision for determining the validity of a discharge in bankruptcy, as is provided in the act of 1867. The difference in the phraseology and the provisions of the two statutes is quite significant, and precludes the construction, so ingeniously contended for by the learned counsel for the plaintiff, that the same mode of testing the validity of the bankrupt's discharge obtains under both acts. Instead of subjecting the bankrupt to the liability of having the validity of his discharge called in question, in any and all suits that should be brought against him, on his debts proved or provable under the Bankrupt Act, for an indefinite time; the proviso, in the 34th Section of the act of 1867, was intended to limit all contestants to the period of two years from the date of the discharge, and to the tribunal therein specified, in respect to the time and mode of annulling his discharge. The act in effect says to all such, "You have had an opportunity to prove your claims, and to show cause why your debtor should not receive his discharge in bankruptcy, you are allowed two years to impeach that discharge, before the tribunal that granted it: at the expiration of that period, you will have had your day in court, and must thereafter be forever silent," *interest reipublicæ est sit finis littitium.* There is but one way of impeaching a discharge in bankruptcy, under the Bankrupt Act of 1867, and that is the mode expressly provided in the 34 Section of that act. It is by no means improbable that the experience of contesting the validity of such discharges before the State courts,

taught Congress the wisdom of restricting the jurisdiction over this subject to the Federal courts.

But there are still more serious objections to the construction contended for by the plaintiff's counsel. The Constitution of the United States confers upon Congress the power to establish a uniform system of bankruptcy. This grant of power carries with it jurisdiction over the person and property of the bankrupt, and authority to provide courts, and all other instrumentalities necessary and proper to carry into effect the general purposes of a Bankrupt Law. The authority of Congress over this subject being paramount to State authority, where it has provided a mode of dealing with a bankrupt's estate, that mode can only be pursued, and it would be an infringement of the paramount law if State Courts should adopt another and a different mode. The authority conferred by the Bankrupt Act of 1867 upon United States Courts, to set aside and annul a discharge in bankruptcy, is incompatible with the exercise of the same power by a State Court. If the validity of a discharge in bankruptcy may be impeached by a State Court, this may be done, though such discharge had been declared valid, in the mode provided in the Bankrupt Act; and the anomaly would be presented of a discharge, recognized as valid by the courts of the United States, and invalid by a State Court. *Sturges* v. *Crowningshield*, 4 Wheat., 196; *Stetson* v. *City of Bangor*, 56 Maine, 286.

The distinction made by the counsel for the defendant, between actions brought before the debtor petitions to be admitted a bankrupt, and those brought afterwards, is unsound. The authority of Congress over the subject-matter is the same in both cases; and it has ever used that authority appropriately to reach that class of cases. In respect to the question at issue in the case at bar, the same principles govern in either case.

According to the agreement of the parties there must be judgment for the defendant, for his costs in the law court only.

Appleton, C. J.; Cutting, Walton, Barrows, and Danforth, JJ., concurred.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where it appears from the evidence that a bankrupt has failed to keep proper books of account, the case is one in which, under Section 29, a discharge cannot be granted.

In re BOUND.

BLATCHFORD, J.—The first specification, in so far as it charges that since the passing of the Bankrupt Act, the bankrupt being a tradesman within the meaning thereof, has not kept proper books of account in his business, is sustained by the evidence, and a discharge is refused on the ground that such allegation is equivalent to an allegation that the bankrupt being a tradesman has not, subsequently to the passage of said act, kept proper books of account, and that the case is, therefore, one in which, under Section 29, a discharge cannot be granted.

S. J. Crooks, for the bankrupt.

J. F. Roberts, for the creditor.

UNITED STATES CIRCUIT COURT—MINNESOTA.

A debtor residing in Kansas was adjudged a bankrupt on the petition of creditors, by the United States District Court for Kansas, and assignees appointed. After the bankruptcy proceedings were instituted, a mortgage creditor commenced suit to foreclose in one of the State Courts of Indiana, without permission of the Bankrupt Court, making the assignees defendants. The mortgagee was a resident and citizen of Minnesota. The assignee in bankruptcy filed a bill in the Circuit Court of the United States for the district of Minnesota against the mortgagee, charging that the mortgage was fraudulent both in fact and under the Bankrupt Law, and asking a decree to have it declared void, and for an injunction to restrain the defendant from further prosecuting his foreclosure suit in Indiana.

Held, that the District Court in which the bankruptcy proceedings are pending, or the Circuit Court for that district, can, in cases where the suit in the State Court is commenced, *after* the proceedings in bankruptcy are instituted, enjoin the plaintiff therein from further prosecuting the same.

That in this case the Circuit Court for the Minnesota district had no *bankruptcy* jurisdiction, and could exercise only its ordinary equity powers, and for this reason the injunction asked for was refused.

Powers of the bankrupt courts and of the Circuit Courts, and the purpose of Congress in establishing bankrupt tribunals considered.

MARKSON & SPAULDING, *Assignees, v.* HEANEY.

THIS is a bill in equity filed in the Circuit Court of the United States for the district of Minnesota, praying for an injunction and relief. The plaintiffs are assignees in bankruptcy of one Antipas Thomas, and bring this bill in that capacity, alleging themselves to be citizens of the State of Kansas. The defendant is alleged to be a citizen of Minnesota, which is admitted in the answer to be true, and he was served in that State with process issued upon the bill.

From the bill, answer, and exhibits, the following facts appear: On the 16th day of December, 1869, Antipas Thomas was, by the District Court of the United States for the district of Kansas (of which he was a resident) adjudged a bankrupt upon the petition of creditors filed on the 3d day of that month. In May, 1870, the plaintiffs were duly appointed assignees in bankruptcy of Thomas; and a deed of assignment has been made to them of all the property and estate of the bankrupt, save such as the law exempts.

The bill alleges, and the answer admits, that *prior* to the commencement of the bankruptcy proceedings against Thomas, to wit, on the 25th day of October, 1869, he, the said Thomas, executed a promissory note to the defendant, Daniel Heaney, for the sum of twenty-six thousand five hundred dollars, and at the same time executed to secure it, a mortgage upon lands belonging to him and situated in Kosciusko county, Indiana. The bill charges that this mortgage is fraudulent: 1st. Because there was only a real debt due from Thomas to Heaney, of four thousand dollars, and because it was made to hinder, delay, and defraud creditors. 2d. Because it was made in violation of the Bankrupt Act, since Thomas was insolvent, and Heaney, when he received the mortgage, knew, or had reasonable cause to believe, that Thomas was insolvent, and that the mortgage was made in fraud of the provisions of the Bankrupt Act. It may here be observed that the answer of the defendant in effect denies these charges of fraud. The

bill avers, and the answer admits, that *after* the proceedings in bankruptcy were commenced, and after the date of the plaintiffs' appointment, as assignees, to wit: On the 14th day of September, 1870, the defendant Heaney commenced in the Circuit Court of the State of Indiana for the county of Kosciusko (where the mortgaged lands are situate) a bill to foreclose the above-mentioned mortgage, making as defendants thereto, not only the said Thomas, *but the present plaintiffs* (the assignees in bankruptcy of his estate). The bill alleges, that on the 19th day of November, 1870, the plaintiffs filed a bill in the Circuit Court of the United States for the district of Indiana, against the defendant, setting up, in substance, the same facts as in the present bill, and praying the same relief, and an injunction against further steps by the defendant in his foreclosure proceeding in the State Court, but the defendant not being a citizen of, or found in the district of Indiana, could not be served, and the bill was consequently dismissed.

It appears from the pleadings that in the foreclosure suit in Indiana, the present plaintiffs (being made defendants thereto) were notified of its pendency *by publication*, pursuant to the laws and the practice of the State courts; and that at the next term, to wit, on the 29th day of November, 1870, the assignees appeared in the said State court and setting up the said adjudication of the mortgagor as a bankrupt, and their appointment as his assignees by the United States District Court for Kansas, pleaded to the jurisdiction of the State court, which plea was decided to be insufficient and exceptions taken. Afterwards, on the 1st day of December, 1870, the plaintiffs filed an answer setting up against the mortgage, in effect, the same matters pleaded in the present bill, to wit, that it is both fraudulent in fact and under the Bankrupt Law. Afterwards, on the application of the present plaintiffs, a change of venue was ordered to the Circuit Court of the State for the county of Steuben, in which court the cause is now pending and stands for trial at an early day.

The bill prays that on the final hearing the mortgage may be declared void, and meanwhile that a writ of injunction issue

to restrain the defendant from proceeding further in prosecution of his foreclosure suit in the State court of Indiana, or from taking or obtaining judgment against the said Thomas on the note, and for general relief.

The bill was presented to the Circuit Judge at his chambers, January 7, 1871, for the allowance of the temporary injunction therein prayed for; and he directed notice to be given to the defendant, which has been done. The defendant appeared and filed an answer to the bill, denying the fraud alleged, and produced, on the hearing of the motion for an injunction, certain affidavits showing the value of the mortgaged estate to be about forty-one thousand dollars, or about ten or twelve thousand dollars more than the sum named in the mortgage, and tending to show that he did not have cause to believe, when he received the mortgage, that Thomas was insolvent. The plaintiffs produced affidavits and documentary evidence, showing that Thomas and one Edwards were bankers in Kansas; and that the firm suspended payment in a few days after the mortgage in question was executed; that they were insolvent; and that the property mortgaged constitutes a large portion of the available assets of the bankrupt, and also tending to show notice of the insolvency, etc., on the part of the defendant when he received the mortgage.

Dillon, C. J.—The adjudication of bankruptcy was made by the United States District Court for the district of Kansas, where the bankrupt resided. The property mortgaged to the defendant is situate in Indiana; and the defendant himself is a citizen of and resides in Minnesota. He has never proved, or offered to prove, his debt in bankruptcy; but, after the proceedings in bankruptcy were instituted and the assignees appointed, and while those proceedings were pending in the bankruptcy court in Kansas, the defendant commenced and is prosecuting in one of the State courts of Indiana, a bill to foreclose his mortgage, making the assignees defendants thereto, and constructively serving them by notice of publication pursuant to the laws of the State, and practice of the State tribu-

nals. The present bill is filed by the assignees, not in the Circuit Court of the United States for the district of Kansas, but in the Circuit Court for the district of Minnesota; and the suit was thus commenced because service of process could not be had upon the defendant in the former district. A similar suit was brought by the assignees in the United States Circuit Court for Indiana; but because the defendant could not be there served, it was withdrawn.

The bill charges that the mortgage made by the bankrupt to the defendant, a few days before the former suspended payment, and which the latter is seeking to have foreclosed in the State court in Indiana, is both fraudulent in fact, and under the Bankrupt Act; and it seeks a decree to have it so adjudged, and meanwhile asks for a writ of injunction to restrain the defendant from the further prosecution of the foreclosure suit. The case is now before me on the application for the injunction. In support of the application, it is argued by the counsel for the assignees, that the Bankruptcy Court in Kansas, in which the proceedings in bankruptcy were commenced, and are pending, has exclusive jurisdiction over the estate of the bankrupt wherever situate, and over the claims of creditors, secured and unsecured, wherever residing; that the assignees are officers of the Bankruptcy Court; that since the adjudication in bankruptcy was had before the defendant commenced his suit to foreclose, it follows that the Bankrupt Court first acquired jurisdiction, and if so, it could not be interfered with by proceedings in any other court, and if such proceedings be commenced, the Federal Courts not only have the power, but it is their duty, to enjoin litigants in the State courts whenever necessary to give full effect to the Bankrupt Act.

On the other hand, the defendant's counsel argue that a mortgage creditor is not bound to, nor can he be compelled to prove up his claim in the Bankrupt Court; that the only effect of not proving it up is, that he waives or loses all right to share in dividends, in respect to any balance of his debt which the mortgaged estate may prove insufficient to pay; that such a creditor, notwithstanding the mortgagor shall have been ad-

judged a bankrupt, may rightfully file his bill in any State court having jurisdiction to foreclose his mortgage; that the defendant did so file his bill in this instance, and that the assignees, having appeared thereto and answered, setting up as a defense the same matters which are made the basis of the present bill, the result is that the State court in Indiana first acquired jurisdiction of the matter in controversy, to wit: the validity of the mortgage, and if so, then on acknowledged principles of law, no other court can arrest or interfere with the exercise of such jurisdiction.

Section 1 of the Bankrupt Act constitutes the District Courts of the United States Courts of Bankruptcy, and confers and defines their jurisdiction:

"That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. * * * And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; *to the collection of the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors;* and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy," etc.

The language of this section is taken in part from the 6th Section of the Bankrupt Act of 1841, and the part above, placed in italics, from Judge Story's opinion in *ex parte* Christy, 3 How., 221, expounding the purpose and policy of that act. I shall again refer to this opinion after calling attention to the

provisions contained in the 2d Section of the Bankrupt Act of 1867, respecting the jurisdiction and powers of the Circuit Courts of the United States.

This section, after giving "the several Circuit Courts of the United States, *within and for the districts where the proceedings in bankruptcy shall be pending*, a general superintendence and jurisdiction" revisory of all cases and questions in the District Court arising under the act, adds that "said Circuit Courts shall also have *concurrent jurisdiction with the District Courts of the same district*, of all suits at law or in equity, which may, or shall be brought *by the assignee* in bankruptcy *against any person claiming an adverse interest*, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

It is not my purpose to recite in detail the various provisions of the Bankrupt Act; but a review of them would clearly show, as I think, that Congress, in passing the act in pursuance of its constitutional power, not only intended to make it uniform, *but operative* throughout the United States. It does not stop at State lines, and the bankruptcy tribunal it establishes not only acts independently of State tribunals, but it would be destructive of the system itself to permit suitors, by resorting to State tribunals to withdraw, against the will of the Bankruptcy Court, property, or cases which belong to the jurisdiction of that court.

Property, wherever situate, which is not exempted from the operation of the act, passes to the assignee, who is an officer of the Bankrupt Court, and thus is in the custody or under the control of that court. This is equally true of property under mortgage as of that which is unincumbered. Sections 14, 20, 22, 25. Debts whenever payable, and creditors wherever residing within the United States, are within the operation of the act. The Bankrupt Court is invested with this jurisdiction over the bankrupt and his estate, and over creditors who are brought involuntarily into it, in order to administer the estate for the benefit of all the creditors according to the irrespective rights. The priorities of *bona fide* mortgagees and lien-holders

are protected by the Bankrupt Act, and will be respected by the Bankrupt Court in the final settlement and distribution of the estate. "*By operation of law*, the deed to the assignee conveys to him *all the estate, real and personal, of the bankrupt*" (Section 14), and "the assignee has authority, under the order and direction of the court, to redeem or discharge any mortgage, * * real or personal, whenever payable, or to sell the property subject to such mortgage." Section 14, and see Sections 15, 20, 22, 25.

Thus, it is plain, beyond controversy, that the property of the bankrupt, though situate, as in this case, in another State, and though mortgaged by the bankrupt prior to the institution of proceedings in bankruptcy against him, is within the jurisdiction, and under the control of the Bankrupt Court in Kansas. I think that to be an erroneous construction of the Bankrupt Act which holds, under the somewhat inapt phraseology of Section 20, that mortgaged creditors have absolutely the election to stand outside of the operation of the Bankrupt Act. Their debts are required to be scheduled, and the mortgaged estate to be inventoried by the bankrupt (Section 11); the title thereto passes to the assignee subject to the mortgage, and the assignee may sell, sue for, and manage the property (Section 14); the debt of the mortgage is provable, and such proof does not waive the lien (Sections 19, 20, 22; the assignee may redeem the mortgaged debt, or sell the equity of redemption vested in him (*Id.*), and it follows from these various provisions that the assignee has a right to call the mortgage-creditor into the Bankruptcy Court, or into the proper Circuit Court, and contest the validity of his mortgage or the amount due thereon. (*Ex parte* Christy, 3 How., 221, and cases cited, *infra.*)

It is not necessary in this case to say that the mortgaged creditor is bound, at all events, to go into the Bankrupt Court and prove his debt, or ask to foreclose, or to have the property sold and his debt paid from the proceeds. *Davis* v. *Carpenter*, 2 N. B. R., 391; *Dwight* v. *Ames*, *Id.*, 455.

It is clear that the assignee has, at all events, the right to

bring the mortgage creditor into the Court of Bankruptcy (unless he prefers to file a bill in equity in the proper Circuit Court), and contest the amount of his debt and the validity of his mortgage, and to have the court make such equitable orders as to the distribution of the property, as seems best.

The powers to "ascertain and liquidate liens" on the property of the bankrupt; "to adjust the various priorities and conflicting interests of all parties, and to marshal and dispose of the different funds and assets," and the other express powers of disposition and sale of property, confer upon the Bankrupt Court the right of control over mortgaged estates and the mortgagees, and, by implication, give the right to prevent this control from being taken away by the resort, on the part of the creditor, to other tribunals, against the will of the Bankrupt Court.

This view of the law is sustained by the opinion of Mr. Justice Nelson, in the case of the Kerosene Oil Company. In that case the Oil Company were adjudged bankrupts on the 16th day of June, 1868. The N. Y. Guaranty and Indemnity Company held a mortgage on the realty of the Oil Company, and, on the 10th day of October, 1868 (after the adjudication in bankruptcy), commenced a foreclosure suit in the *State* Court. A bill was filed by the assignee in the Bankruptcy Court, alleging the invalidity of the mortgage, and praying that it be declared void, the property sold, and the proceeds brought into court and disposed of according to the rights of the several parties, and for an injunction enjoining the Guaranty and Indemnity Company from taking any further proceedings in the foreclosure suit. The injunction was granted by the District Court (2 N. B. R., 569), and, on review, this action was sustained by Mr. Justice Nelson (3 N. B. R., 125), who directly affirmed the jurisdiction of District Courts to entertain such a bill and grant relief, and asserted a concurrent jurisdiction in the Circuit Court of the same district.

The right, in a proper case, to enjoin proceedings in State Court which contravene the Bankrupt Act, is declared, by the Circuit Court of the United States, in the case of *Irving* v.

Hughes, heard before Grier and Cadwallader, J. J. The court says: "The State Court cannot be enjoined. But the litigants in it may be restrained from doing what would frustrate, or directly impede, the jurisdiction expressly conferred by the Bankrupt Act." (2 N. B. R., 62.) And it is the opinion of Chase, C. J., that, after bankruptcy, liens must be enforced under the superintendence of the national tribunals. (*In re* Wynne, 4 N. B. R., 23.) A similar view of the Bankrupt Act of 1841 was taken by Mr. Justice Story in *ex parte* Christy, 3 How., 221.

"Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges and expenses, could be safely relied on where the jurisdiction was confided to a single court in the collection of assets, in the ascertainment and liquidation of liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing sales at such time and in such manner as should best observe the interests of all concerned; in preventing, by *injunction* or otherwise, any particular creditor from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights and remedies in the State tribunals; and, finally, in making a due distribution of the assets, and bringing to a close, within a reasonable time, the whole proceedings in bankruptcy."

This language was quoted and approved by Mr. Justice Swayne, as applicable to the present Bankrupt Act. *In re* Neal, 2 N. B. R., 241; and by Durell, J., *in re* Barrow, 1 *Ib.*, 481.

If the present bill had been filed in the court for the district of Kansas, and service could have been had on the defendant in that district, I should, for the reasons above stated, feel quite clear that I would have the power to award the writ of injunction against the defendant, and that, under the circumstances, it would be my duty to do so. But this bill is filed in the Circuit Court for the Minnesota district, and was so filed because the

defendant resided in that district, and could be served with process therein, and it proceeds upon the assumption that the Federal Courts in Kansas, by reason of the inability to serve the defendant therein, would be unable to take jurisdiction of the suit, had it been there instituted.

I am inclined to the opinion that the Circuit Court for the Minnesota district has no jurisdiction over this controversy conferred upon it by the Bankrupt Act; and that, whatever powers it has, and can exercise in the present case, will be in virtue of its ordinary equity jurisdiction.

By recurring to the 1st Section of the Bankrupt Act, it will be seen that the "several District Courts are constituted Courts of Bankruptcy, with original jurisdiction in their respective districts, in all matters and proceedings in bankruptcy."

The powers which this section confers upon the District Courts are limited to cases of bankruptcy pending therein, as was very properly held by Mr. District Judge Blatchford, *in re* Richardson, 2 N. B. R., 202. In that case the petitioners had been adjudged bankrupts in Louisiana, and applied to the U. S. District Court for the Southern District of New York, for an injunction to restrain certain creditors from prosecuting a suit against them in the State Courts of New York. It was denied for want of jurisdiction, the judge alluding to but expressing no opinion upon the question whether the Circuit Court for the New York district, under its general equity powers, or the Bankrupt Court, or Circuit Court of Louisiana, could, without further legislation, give relief. The provision of the Bankrupt Act as to the jurisdiction of the Circuit Courts, is that "the several Circuit Courts of the United States within and for the districts *where the proceedings in bankruptcy* shall *be pending*, shall have concurrent jurisdiction with the District Courts of *the same district*, of all suits," etc. Under this provision, the Circuit Court of Minnesota has no bankruptcy jurisdiction in the present case, since the bankruptcy proceedings are pending in the District of Kansas. It can only exercise its ordinary equity powers; and I think it cannot be claimed, aside from its jurisdiction in bankruptcy, that a court of the United States

could be warranted in enjoining a foreclosure proceeding in a State court. A State Court of Equity in Minnesota would scarcely look with favor on an application, because the defendant resided there, to stay him from prosecuting a foreclosure suit in another State, but would leave the parties in the court which had, or was asserting, jurisdiction over them. If the Bankrupt Act confers no bankrupt powers with respect to the case in the Circuit Court for the District of Minnesota, it seems to me that it can only award an injunction on the same principle that would apply were the application made to a chancellor in the State tribunals. This point, as to the jurisdiction of the Minnesota Circuit Court, has not been presented by counsel, and I, therefore, express only my first impressions concerning it.

Since I refuse, for the present, the injunction on this ground alone, I will allow the counsel to be heard upon it, if they think my impressions are erroneous.

In this view of the case, it is unnecessary to give any decided opinion respecting the question whether on a similar bill filed in the Circuit Court for the District of Kansas, service can rightfully be made on the defendant without the limits of the district. Under the Judiciary Act which limits the powers of the Federal courts to their respective districts, service within the districts, or a voluntary appearance, is necessary to jurisdiction. If this limitation obtains in all suits and proceedings, arising under the Bankrupt Act, it certainly will fail in many instances, without further legislation, to meet the exigencies of particular cases, or to enable the courts to carry into effect the provisions of the statute. The power to bring creditors outside of the district within the operation of the Bankruptcy Court is often necessary to the exercise of the jurisdiction and powers conferred by the act; but at present, I refrain from giving any opinion upon the right to serve bankruptcy process or process in bankruptcy suits beyond the limits of the district in which the bankruptcy proceeding is pending.

The question may be presented by an application by the assignees to the Bankrupt Court, to sell the mortgaged estate

free of incumbrance, substituting the proceeds in the place of the property sold. Bankrupt Act, Section 25; *Dwight* v. *Ames*, 2 N. B. R., 455; *in re* Neal, *Ib.*, 241; *in re* Barrow, 1 *Ib.*, 481. If this section applies to such a case as the present, the provision is that "The court may, upon the petition of the assignee, after such notice to the claimant, his agent, or attorney as the court shall deem reasonable, order the property to be sold under the direction of the assignee, who shall hold the funds received in place of the estate disposed of."

Not in terms at least limiting the notice to claimants residing in the district. Or the question may be presented by a bill like the present, filed in the Circuit Court for the District of Kansas, to impeach the mortgage, and asking for an injunction against further proceeding by the defendant in his foreclosure suit in Indiana. But until it arises in such a shape as to require disposition, and has been fully argued, it will be better to decline its examination or discussion. The injunction is refused, but the bill may be retained for final disposition or dismissed, as plaintiffs' counsel may be advised.

Injunction denied.

Z. E. Britton and *Morris Lamphrey*, for the motion.

Jas. T. Lane and *Davison & True*, contra.

UNITED STATES DISTRICT COURT—OREGON.

The Constitution gives Congress full power over "the subject of bankruptcies" in the United States, and in the enactment of laws on this subject Congress is not limited to the scope or details of the Bankrupt Act in force in England at the time of the formation and adoption of the Constitution; the subject is committed to the wisdom and discretion of the Legislature, with the one qualification that its laws shall be uniform in their operation throughout the United States.

The property of an insolvent debtor represents, in whole or part, the credit given him by his creditors, and in good morals belongs to them, and the Bankrupt Act, which, under certain circumstances evincing bad faith upon the part of the insolvent, compels a distribution of such property among the creditors in proportion to their debts, is a wise and just measure.

In this court all pleadings must be special, and therefore a mere general denial of the intent with which an act is alleged to have been done is

not a good defense to a charge of having committed an act of bankruptcy, but the respondent must also allege, and prove, with what intent he did the act complained of.

When the unlawful intent is the necessary consequence of the act charged, as in the case of a payment of one creditor by an insolvent debtor, a mere denial of such intent is no answer to the petition, and judgment may be given against the respondent as upon a failure to answer.

19 B.R. 4

In re SILVERMAN.

ON December 7, 1870, Livingston and Levy, doing business as the firm of Livingston & Co., at San Francisco, filed a petition in bankruptcy against Charles A. Silverman, praying that he might be adjudged a bankrupt.

It appears from the petition that the debt due from S. to the petitioner amounts to five hundred and thirty-one dollars and fifty cents, for goods sold and delivered to S. in February, 1869, and that S. has since committed the following acts of bankruptcy:

First. That on or about November 15, 1870, S. sold and transferred his property to certain persons, to wit: an undivided one-fourth of the property and effects of the Oregon Dray Co., with intent to thereby hinder, delay, and defraud his creditors; and with the intent to delay and defeat the Bankrupt Act.

Second. That on or about November 16, 1870, S. being insolvent, paid Wasserman & Co., one of his creditors, the sum of one hundred dollars, with intent to thereby give a preference to W. & Co.

On December 16, 1870, S. answered the petition, denying that he sold his property or made the payment to W. & Co., *with the intent* in the petition alleged.

On the same day the petitioner filed a motion for judgment on the pleadings, upon the ground that the answer of S. in fact admits the acts of bankruptcy charged in the petition; and on December 28 the motion was argued and submitted.

Upon the argument, counsel for the debtor confidently asserted that Congress had no power to pass a bankrupt law applicable to other persons than traders, and that an insolvent person had a natural right to dispose of his effects as he chose, and by such disposition to prefer one creditor to another. Coun

sel cites no authority in support of the objection to the constitutionality of the act, but maintained generally that the power of Congress in the premises was limited to the passing of such Bankrupt Acts as were in force in England at the time of the formation and adoption of the Constitution, and that these did not apply to any one except traders.

The Constitution (Article I., Section 8) provides: "The Congress shall have power—To establish * * *uniform laws on the subject of bankruptcies* throughout the United States."

If language means anything, this is something more than the power to re-enact the particular Bankrupt Act then in force in Great Britain. It is a grant of plenary power over the "subject of bankruptcies." Now the *subject of bankruptcies* includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends. Congress is given full power over this *subject*, with the one qualification, that its laws thereon shall be uniform throughout the United States. Whether these laws shall apply to *all* fraudulent or insolvent debtors, or only to such as are engaged in trade, is committed by the Constitution to the wisdom and discretion of the law-making power. This may be illustrated by reference to the clause in the section above quoted, whereby the Constitution gives Congress power:—

"To establish post offices and post roads."

Is this to be considered a plenary grant of power over the *subject* of the collection, conveyance, and delivery of all such letters, newspapers, and other things as in the progress of society it may be found useful and convenient to transmit from place to place by public post, or does it merely authorize Congress to establish and maintain such a meagre and primitive postal system as was then established in Great Britain by Act of Parliament? It seems to me it is only necessary to state the latter conclusion or proposition to show its absurdity.

If the power to establish post offices and roads is not full

power over the subject, to be exercised from time to time according to the varying demands and necessities of society, then it is clear upon the argument against the Bankrupt Act, that carrying the mail by steam, carrying it by railway, transmitting books through it, and dispatching it daily, are all unconstitutional, for the system in force in England at the adoption of the Constitution provided for none of these things.

In re Klein, decided in the Circuit Court for the District of Missouri, and reported in 1 N. B. R., 542, Mr. Justice Catron held the Bankrupt Act of 1841, which was not restricted to traders, to be constitutional. In that case the objection to the act was two-fold. First, That it allowed the debtor to avail himself of the benefit of the act upon his own petition; and, second, That it was not restricted to traders; contrary in both particulars to the provisions of the English act. In considering these objections the learned judge said:

"If the power conferred on Congress carries with it these restrictions, then the District Court properly refused to discharge the applicant, Klein, because the Act of Congress was unconstitutional in his case. But other and controlling considerations enter into the construction of the power; *it is general and unlimited*; *it gives the unrestricted authority to Congress over the whole subject as the Parliament of Great Britain had it;* and as the sovereign States of this Union had it before the time when the Constitution was adopted."

* * * * * * *

"The District Court relied confidently on the ground that Congress can pass no law violating contracts; and that the clause of the Constitution conferred no such authority, because the English Bankrupt Laws, by which the power is supposed to be restricted, only permitted the contract to be annulled at the election of four parts in five of the creditors in number and value; and therefore they annulled it by a new contract. This argument proceeds on the assumption, that a proceeding in bankruptcy can only be had at the election of, and for the benefit of creditors; and that every material step is their joint act, to which the debtor is compelled to submit. For the

present it will only be necessary to say, that one prominent reason why the power is given to Congress, was to secure to the people of the United States, as one people, a uniform law by which an insolvent debtor might be discharged from the obligation of his contracts, and his future acquisitions exempted from his previous engagements; that the rights of debtor and creditor equally entered into the minds of the framers of the Constitution. The great object was to deprive the States of the dangerous power to abolish debts. Few provisions in the Constitution have had more beneficial consequences than this, and the kindred inhibition on the States, that they should pass no law impairing the obligations of contracts.

The inhabitants of States producing largely must be creditors; the inhabitants of those that are consumers will be debtors; Bankrupt Laws of the latter States might ruin the producers and creditors, they having no interest or power in the government of the consuming States; and it being the interest of the latter to annul the debts of non-residents, no remedy would exist for the grossest oppression. No laws of relief would be more effectual in time of pressure by foreign creditors, nor more likely to be adopted. If one State adopted such a measure it would furnish a fair occasion for others to do the same, on the plausible pretext of self-defense; others would be forced into a similar bad policy, until discredit and ruin would overspread the entire land, by an extinction of all debts; and a consequent prostration of morals, public and private, on the subject of contracts. This evil had, to a certain extent, occurred, and was fresh in the minds of the framers of the Constitution; and no doubt it would again occur in some of the States, but for the provisions under consideration standing in the way of abrogating the private contracts of non-residents.

But if Congress passed the law, *it must be uniform throughout the United States*, then the entire people are equally represented, and have the power to protect themselves against hasty and mistaken legislation, by its repeal, if found oppressive in practice. * * * * * * *

In considering the question before me, I have not pretended

to give a definition (but purposely avoided any attempt to define), the mere word, BANKRUPT. It is employed in the Constitution in the plural and as a part of an expression: "the subject of bankruptcies." The ideas attached to the word in this connection, are numerous and complicated; they form a subject of extensive and complicated legislation; *of this subject Congress has general jurisdiction*, and the true inquiry is —to what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is a discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject —distribution and discharge—are in the competency and discretion of Congress.

With the policy of a law, letting in all classes, others as well as traders, and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law-makers.

The natural right of an insolvent to dispose of his property as he chooses, is not directly pertinent to the question before the court, but as counsel seems disposed to attach some importance to the claim and made it the basis of an indirect attack upon the justice and policy of the act, if not its constitutionality, it may be well to inquire if there is any such right. Whence comes the property of an insolvent? A moment's reflection will satisfy any one that it represents in whole or in part the credit given to the insolvent by his creditors; and therefore in good morals belongs to them and not him. Strictly and truthfully speaking, an insolvent has no property, and, therefore, he has no *natural* right to dispose of the property in his possession, otherwise than with the consent of the real owners—his creditors.

I know that after a series of conflicting decisions, it was established at common law that a debtor in failing circumstances might prefer a creditor. But the doctrine and practice were never regarded as consonant with good morals, and by

the intervention of the Legislature in the enactment of Bankrupt and Insolvent Laws, the contrary rule has been generally established. In *Cunningham* v. *Freeborn*, 11 Wend., 256, Mr. Justice Nelson upon this subject, and the kindred one of voluntary assignments, says:

"The root of the vice in all these cases of voluntary assignments by failing debtors, *lies in the principle of preference.* It affords the pretense for putting the property into the possession of a friendly trustee, and thereby may substantially secure to the debtor the control of it for a long time after the law presumes it to have passed from him and when his own possession would be incompatible with its security. In *Estwick* v. *Cailland*, 4 T. R., 424, Lord Kenyon said, that 'it was neither illegal or immoral to prefer one kind of creditors to another.' The soundness of this proposition loses some of its weight, when advanced in a case one would be apt to select above all others to illustrate the reverse; but I can well imagine one that would justify it. *As a general proposition, however, the experience and observation of mankind must bear witness against it; and no one knew better than his lordship, and those familiar with courts of justice, how frequently the principle is perverted and made subservient to the gratification of vindictive feelings and the foulest ingratitude, as well as injustice towards honest and confiding creditors.*"

The answer of the debtor implicitly admits the indebtedness and insolvency as alleged in the petition, as well as the debtor's property and the payment of one of his creditors, and simply denies that such sale or payment was made with the intent to defraud or prefer.

Counsel for petitioner assuming that these denials, or some of them, are mere traverses of conclusions of law from the facts admitted, asks that they be disregarded and that judgment be given against the debtor notwithstanding, in accordance with the prayer of the petition.

It is a well settled rule of pleading that a traverse or denial must not be taken on a mere matter or conclusion of law; for the effect would be to submit the question of law to the jury

rather than the court. But when the conclusion is a mixed one of law and fact, then it is clearly traversable, and the issue raised thereby triable by a jury under the directions of the court as to the law. 1 Chitty's Plead., 645; 2 Estee's Plead., 660. But under Rule 36 of this court, which provides that "all pleadings and allegations of fact shall be special and verified," a simple denial of the intent alleged in the petition is not, in any case, a sufficient defense thereto.

If the debtor, notwithstanding the admitted circumstances, did not sell his property or make the payment complained of with the intent alleged by the petitioner, he should state with what other intent he did make such sale or payment. By this means the petitioner will be apprised of what the particular defense is, and come prepared to meet it at the trial, or if he thinks it insufficient in law he may demur to it. In this way much unnecessary trouble, vexation, delay, and expense is saved to both parties. For instance, if such were the fact, the debtor might allege in his answer that he sold his property as in the petition alleged for the purpose and with the intent of investing the proceeds in real property in Portland, or for the purpose of loaning the sum on note and mortgage, or investing it in the public funds, as he might lawfully do, and not with the intent to thereby hinder, delay, and defraud his creditors, as alleged in said petition.

The sale of his property by a debtor is not necessarily an act of bankruptcy. It depends upon the intent with which it is done; and as this intent is not a mere conclusion of law, but of law and fact compounded, it may be traversed or denied, and the matter tried by a jury under the direction of the court as to the law. Yet it is probable that the act should be so construed as to hold any disposition of a debtor's property to be *prima facie* fraudulent and contrary to the act, and thereby put the burden of proof upon the debtor to show that the same was done with a lawful intent, and is therefore not an act of bankruptcy. Such, at least, seems to be the necessary effect of the provision in Section 41, which in terms declares that upon the trial of a petition in involuntary bankruptcy the debtor shall be adjudged

a bankrupt unless he proves the facts sets forth in the petition not to be true.

But, as has been shown, under the rules of this court, a mere general denial of the intent with which S. is alleged to have sold his property, is not a sufficient plea, but the same must not only traverse the intent alleged, but must state with what other intent it was in fact done; still, I think that when the act is indifferent—not necessarily unlawful, contrary to the statute—that a general denial of the unlawful intent alleged, is sufficient to raise an issue and prevent the petitioner from having judgment on the pleadings as for want of an answer. The defect in the answer should be taken advantage of by demurrer. But if the parties choose to go to trial upon such a plea, proof of a lawful intent can be made under it.

So far, then, as the first act of bankruptcy alleged is concerned, the motion must be denied.

As to the payment of the one hundred dollars to the creditor of S., I am satisfied upon the facts admitted that he must be conclusively presumed to have intended to give such creditor a preference. The necessary effect of such payment is to give a preference. I cannot conceive of any circumstances under which an insolvent debtor can make a payment to one of his creditors without intending to thereby prefer such creditor, unless it be when the debtor is ignorant at the time of his insolvency. In this case the debtor admits that he was insolvent at the time he made this payment, and there is no pretense that he was not aware of it. Indeed, he is presumed to know it until the contrary appears. Under these circumstances, a mere denial of the intent to give a preference is a traverse of a conclusive presumption of law, and therefore frivolous and immaterial.

In *Cunningham* v. *Freeborn*, cited above, it was alleged in the bill that a certain voluntary assignment was made with a fraudulent intent. The answer of the defendant admitted the assignment but denied the intent. The case was heard on bill and answer, and in the course of the opinion, the court held that the admission of facts which are *per se* fraudulent in judgment of

law, are as much so, and as conclusive upon the defendant, as if he had in express terms admitted a fraudulent intent in his answer; and in such case, any subsequent disclaimer of such intent will not avail him.

In re Drummond, 1 N. B. R., 231, it was held that a payment by an insolvent debtor to one of his creditors necessarily gave such creditor a preference, and that the debtor, being presumed to know the consequence of such act, *conclusively presumed* to have intended it.

In *Driggs* v. *Moore*, 3 N. B. R., 564, there was a similar ruling. The syllabus states the conclusion of the court in these words: "If, from the circumstances under which the mortgage was given, it must necessarily have operated as a preference, the creditor will not be heard to say in support of the transaction, that the debtor did not intend to create one." 1 Abb. C. & D. R., 440.

In *Campbell*, assignee of *H. & E.*, v. *The Traders' Bank et al.*, 3 N. B. R., 498, H. & E. being insolvent gave their note with a warrant to confess judgment thereon in settlement of a debt due The Trader's Bank. Drummond, J., held that H. & E. must have intended to give a preference to the Bank. In the course of the opinion he says: "It is to no purpose that a man says, when he is insolvent, and signs a note and warrant of attorney, and gives it to his creditor, the effect of which is to enable a creditor to enter up judgment and issue execution and levy on his property, that he did not intend to give a preference. Actions in this, as in so many other cases, speak louder than words, and *the conclusion necessarily follows from such a state of facts, that he does intend to do what is the reasonable consequences of what he does*, or, according to the oft-repeated statement of the books, a man is supposed to know what is the necessary consequence of his own acts."

In re Smith, 3 N. B. R., 377, among other things, the petition alleged that Smith, being insolvent, made a voluntary general assignment of his property for the benefit of all his creditors, with the intent to defraud or delay the operation of the Bankrupt Act, and to prevent his property from being distributed

according to the provisions of said act. In answer to this allegation the respondent pleaded, that such assignment was made without preference, for the sole purpose of having his creditors share equally his property in proportion to their debts, and not with the intent alleged in the petition. The petitioner moved for judgment on the pleadings, and the motion was allowed. Hall, J., in the course of his opinion, after demonstrating that such an assignment, if upheld, would necessarily and absolutely defeat the operation of the Bankrupt Act, says: "There can be no possible doubt that the execution of the general assignment under the circumstances of this case was an act of bankruptcy; and the only question upon which there can be the slightest doubt is, whether, in the absence of any rebutting proof—and even in the absence of a replication to the respondent's answer—the denial of the intention imputed to him, and which is necessary to constitute the act of bankruptcy, must not prevent an adjudication until the question of intention has been submitted to a jury.

Every person of a sound mind is presumed to intend the necessary, natural, or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequence must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of want of such intention. See also *in re* Sutherland, 1 N. B. R., 541, decided in this court.

In opposition to these cases no authority is cited by counsel for respondent. He rests his case upon the narrow ground that because *the intent to prefer* is a necessary ingredient in the act of bankruptcy it may be denied and tried as an issue of fact. But this assumes that the presumption which the law makes from the facts admitted—namely, that a preference was intended—in only a disputable presumption, and may therefore be controverted. If, however, the preference is a *necessary* consequence of the payment, the law *conclusively* presumes the intent to prefer. This position is correct beyond

a doubt, upon both reason and authority. Now, that the giving of a preference is a necessary consequence of the payment by an insolvent debtor of one of his creditors is self-evident. Argument cannot make the matter plainer than the statement of the proposition. The creditor is preferred because he has received his debt and his fellow-creditors have not. The debtor being insolvent has not the means to pay them, and by paying one in full he has defrauded the others of their just proportion of his estate. Other motives may also have actuated the debtor, but that makes the payment none the less a preference. Indeed, he may expect to become able in time to pay all his creditors in full, and may intend to do so as soon as he can; but this does not affect the question. The creditor whose debt is paid is nevertheless preferred over his fellows. He has his money, but they must depend upon the often *double* uncertainty of whether their debtor will in time become *both* able and willing to pay their debts in full.

Notwithstanding the length of this opinion, I cannot omit to notice the oft repeated declaration of counsel for respondent that proceedings in bankruptcy are quasi criminal and must be strictly construed in favor of the respondent. If any part of the Bankrupt Act should be so construed it is Section 39, which provides for involuntary adjudication.

In re Locke, 2 N. B. R., 382, Lowell, J., in speaking of this section, says: "it is highly *remedial*, and should be construed liberally in favor of creditors, because its scope and purpose are to oblige insolvent traders to take advantage of the act, and thus insure an equal distribution of their estate under its carefully framed provisions."

In re Muller & Brentano, 3 N. B. R., 329, decided in this court, in reply to a similar argument from counsel against the operations of the act, the court said: In my judgment this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, *to whom in justice it belongs*. It is *remedial*, and seeks to protect the honest creditor from being overreached and defrauded by the

unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass laws on "the subject of bankruptcies" is one of the express grants of power to the National Government; and history teaches that the want of a uniform law on this subject throughout the States was one of the prominent causes which led to the assembling of the Constitutional Convention and consequent formation and adoption of the Federal Constitution.

Such a statute is not to be construed strictly as if it were an obscure or special penal enactment, and this was the sixteenth instead of the nineteenth century. The act establishes a *system* and regulates in all their details the relative rights and duties of debtor and creditor. Such an act must be construed—as indeed should all public acts—"*according to the fair import of its terms, with a view to effect its objects and to promote justice.*"

The petitioner is entitled to judgment declaring the respondent a bankrupt, on the ground of having paid W. & Co., with intent to give them a preference.

Fechheimer, for petitioner.

Stout, for respondent.

UNITED STATES COMMISSIONER'S COURT—NEW YORK CITY.

An insolvent obtained goods on credit from various parties with the intent to defraud, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, and on a hearing before a commissioner he was held to bail in the sum of five thousand dollars.

UNITED STATES *v.* GEARY.

PREVIOUS to July 21, 1869, the defendant and Wm. W. Borden were engaged in the boot and shoe retail trade at No. 270 Greenwich street, in this city, under the name of Borden & Geary. On that day they filed a petition in bankruptcy in the office of the Clerk of the Southern District of New York. They

were subsequently adjudged bankrupts, and at a meeting of their creditors George G. Nason, of the firm of Cammeyer & Nason, wholesale boot and shoe dealers, of this city, was chosen assignee, and his appointment confirmed by the court. The assignee then proceeded to examine the defendant Horace P. Geary, before Register Fitch, to whom the case had been referred, as to property of the bankrupts alleged to have been concealed or disposed of contrary to the provisions of the Bankrupt Law.

On this examination the defendant, Horace P. Geary, testified in effect that on the 16th day of July, 1869, the bankrupts consulted their counsel, Messrs. Cheney & Dixon, and then decided to go into bankruptcy, and instructed their counsel to prepare their petition and the other papers necessary for that purpose. The defendant transferred to Cheney & Dixon a promissory note of A. McLean for two hundred and fifteen dollars, payable two months after its date, July 15, 1869, and two promissory notes of the same date, made by Henry V. Geary, the brother of the defendant, the one for fifty dollars and nine cents, payable one month after date, the other for fifty dollars, payable two months after date, and paid these notes and one hundred and seventy-five dollars in cash on the 20th of July, 1869 (the day before they filed their petition in bankruptcy), to their counsel for law expenses. The defendant also testified that Cheney & Dixon had been their counsel only for about a week previous, and that they owed their counsel nothing except for services in the bankruptcy proceedings.

It also appeared, from the testimony of the defendant, that previous to May 5, 1868, they had a retail boot and shoe store in Bleecker street, in this city, which on that day they sold out to Henry V. Geary, the brother of the defendant, and sold him goods on open account, but on no fixed time of credit; that on the 15th day of July there was a balance of about six hundred dollars due by Henry V. Geary to the bankrupts, and the defendant told his brother Henry that Borden & Geary were about to become bankrupt, and then took his twelve notes for the amount, payable monthly, and gave him a receipt in full.

The affidavits also alleged, that the books of the bankrupts showed that Henry V. Geary had a credit with them, not exceeding sixty days, and that the defendant, in extending the time for the payment of his debt, by taking from him those twelve notes running from one to twelve months, prevented the debt from coming into the possession of the assignee. The complainants further charge, that by the foregoing acts the defendant, being a debtor or bankrupt, disposed of part of the estate of the bankrupts with intent to prevent it from coming into the possession of the assignee in bankruptcy, and to hinder, impede, or delay him in recovering or receiving the same, and made a payment, gift, sale, assignment, transfer, or conveyance of property belonging to their estate with the like intent, and did, with intent to defraud, willfully and fraudulently conceal from his assignee, or omit from their schedule property or effects belonging to their estate.

The affidavits further alleged, that it appears from the books of the bankrupts that they were insolvent on the 21st day of April, 1869; that the books were kept by the defendant, Horace P. Geary, who is a practical book-keeper, and himself kept the books in his own handwriting, and therefore knew the fact of their insolvency on that date. After which, and within three months before the filing by them of their petition in bankruptcy (on July 21, 1869), the bankrupts obtained on credit from various parties in this city goods or chattels with intent to defraud, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, which, the complainants allege, was a further violation of the Bankrupt Law.

The defendant was held to bail by the commissioner in five thousand dollars.

NEW YORK SUPREME COURT.

The effect of granting a stay upon a judgment against a corporation before execution returned, or setting aside an execution issued thereon, the stockholders of which are personally responsible, will be to discharge "a person or officer or member thereof" where such liability must be predicated of such judgment, and execution returned unsatisfied. Hence, a motion on the part of the defendants to stay proceedings after judgment must be denied.

SARAH O. ALLEN, *Administratrix, etc.*, v. THE SOLDIERS' BUSINESS MESSENGER AND DISPATCH COMPANY.

THIS was a motion on the part of the defendants to stay proceedings after judgment and execution issued against them as a matter of statutory right.

BRADY, J.—Assuming that, by the 27th Section of the Bankrupt Law, the general provisions of the act are made applicable to corporations, nevertheless it is expressly declared, that no allowance or discharge shall be granted to any corporation or joint stock company, or any person or officer or member thereof; and this establishes a distinction between persons and corporations and members thereof. It has been held that the provisions of Section 21, declaring that no creditor proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor, against the bankrupt, applies only to a debt which will be discharged. Blatchford, J., *in re* Wright, 1 N. B. R., 393; *in re* Robinson, 1 N. B. R., 285. The proof of a debt, therefore, against a corporation, does not *per se* prevent the continuance of an action against it, inasmuch as it cannot be discharged under the Bankrupt Law, and more particularly where a judgment against it is necessary to perfect a legal remedy. The creditors have a right to all the property of the corporation, which is all that they acquire by bankruptcy; and the provision in the law declaring that it shall not be discharged, is based upon that proposition, and the ulterior remedy which the stockholder may have predicated of the personal responsibility of his stockholders, officers, or members, and which

would be destroyed if the remaining debt itself were discharged. The effect of granting a stay upon the judgment against a corporation, before execution returned, or setting aside an execution issued thereon, the stockholders of which are personally responsible, will be to discharge "a person or officer or member thereof" where such liability must be predicated of such judgment and execution returned unsatisfied; and thus to indirectly accomplish what the Bankrupt Law has declared shall not be attained. The defendants were incorporated by Act of Legislature in 1867 (Chapter 382, Vol. I., page 849), and by the 8th Section the stockholders are made liable for the debts of the company, but not until after the judgment and an execution returned unsatisfied in whole or in part against the corporation. For these reasons the motion is denied.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The burden of proof is on the creditors objecting to the discharge of a bankrupt to show that the debt was false and fictitious, and when there is a failure to substantiate the allegation, a discharge will be granted.

In re ORCUTT.

BLATCHFORD, J.—There are two specifications of objection to the bankrupt's discharge in this case.

First, that he had admitted a false and fraudulent debt in favor of Alva Clarke, his father-in-law, against the estate; second, that having knowledge that Alva Clarke had proved a false and fictitious debt against his estate, he did not disclose the same to his assignee in this matter one month after such knowledge.

I find no evidence that Clarke has proved any debt whatever against the bankrupt; therefore the second ground above-named fails. As to the first ground, what is meant by admitting a debt? How does a bankrupt admit a debt? Can a debt which is not proven be said to be admitted?

In the present case, which is a voluntary one, the bankrupt

has put a debt due to Clarke in the list of debts due by the bankrupt, in the schedule appended to his petition.

The 29th Section provides that no discharge shall be granted if the bankrupt has admitted a false and fictitious debt against the estate, or if, having knowledge that any person had proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge. In none of the English statutes is it made a ground for refusing a discharge that the bankrupt had admitted a false or fictitious debt against his estate, as distinguished from the suppression by the bankrupt of knowledge that a false or fictitious debt has been proved against his estate. The United States Bankrupt Act of 1841, 5 United States Statutes at Large, 443. That Section provided that if a bankrupt should in the proceedings under that act admit a false or fictitious debt against his estate he should not be entitled to a discharge or a certificate thereof.

The failure of a bankrupt to disclose to the assignee knowledge that a false and fictitious debt had been proved against his estate, was not made, by the act of 1841, a ground for refusing a discharge, except as it might have been regarded as the admission of a false or fictitious debt against his estate. The literal provision in the 4th Section of the act of 1841, was: "If any such bankrupt shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate."

In this case the bankrupt sets forth, in the schedule to his petition, which was a voluntary one, the debt in favor of Clarke, which is alleged to be a false and fictitious debt. If it was a false and fictitious debt, the so setting it forth was an admission of it against the estate, which would bar a discharge. But the burden of proof is on the objecting creditors, to show that the debt was false and fictitious. The only proof they have furnished on the subject is the examination of the bankrupt himself, and I think they have failed to substantiate the allegation.

A discharge is therefore granted.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

The allegation of stoppage and suspension of payment on a certain day, upon commercial paper which was made and dated within the six months next preceding the actual filing of the petition, connected with the allegation that payment of the commercial paper (a due bill) had been demanded at different times, and that the respondent had failed to make such payment, was equivalent to an allegation of a demand for payment on that day.

Order of adjudication granted.

In re CHAPPEL.

HALL, J.—This was a motion on the return of an order to show cause for the adjudication of the bankrupt on the grounds that he had committed an act of bankruptcy by suffering his property to be taken on legal process within six months next preceding the commencement of bankruptcy proceedings. And also on the ground that the bankrupt had suspended payment of his commercial paper (a due bill), and had not resumed payment of the same within a period of fourteen days, etc.

It appearing that the allegation setting forth the act of bankruptcy as suffering the bankrupt's property to be taken on legal process, did not allege any specified day, but that the said act was committed on the —— day of ——, 1870, and that the only other allegation of the time of its commission, was, that it was committed within the six months next preceding the date of the petition, which was not dated, but which had been sworn to three days before it was filed, the court held the petition defective in this respect.

As to the allegation that the bankrupt committed an act of bankruptcy on the 28th day of September, 1870, by suspension and non-resumption of his "commercial paper," within a period of fourteen days, the same not being a note, but a due bill, bearing date within the six months next preceding, and payable on demand, upon which there seemed indorsed several partial payments, objection was urged to adjudication on this specification, on the ground that there was no allegation of demand.

The court held that the allegation of stoppage and suspension

of payment on the 28th of September, 1870, upon commercial paper which was made and dated within the six months next preceding the actual filing of the petition, connected with the allegation that payment of the due bill had been demanded at different times, and that the respondent had failed to make such payment, was equivalent to an allegation of a demand for payment on that day. Order of adjudication granted.

Audley W. Gazzam and *George Wadsworth*, for petitioning creditors.

George Gorham, for bankrupt.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

In an appeal by a creditor from the District to the Circuit Court, the party appealing should, within the ten days limited therefor, file a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law, to which the assignee should plead, and the cause proceed to trial as in actions at law, and prosecuted in the usual manner in this court, which, by Sections 24 of the act and 25 of the General Orders in bankruptcy, such claimants are required to do.

Non-compliance with the provisions of Sections 8 and 24, and Rule 26, are grounds for dismissing an appeal to the Circuit Court.

The mode of review by petition, bill, etc., under Section 2 of the act, is expressly confined to cases in which no special provision is otherwise made, and does not apply to cases where an appeal may be taken.

Claimants cannot be permitted to treat the petition for a review as such a statement as the statute requires upon an appeal.

In re Place & Sparkman.*

Woodruff, J.—The claim of the firm of C. P. Fisher & Co., as creditors of James D. Sparkman, to the amount of about forty-six thousand dollars, was rejected by the District Court, and a decree to that effect was entered in that court on the 25th of June, 1870.

On the 5th day of July thereafter, the said firm so claiming to be creditors, claimed an appeal from the decision of the District Court, and gave notice thereof as required by Section 8 of the Bankrupt Law.

* See 1 N. B. R., 673; 3 N. B. R., 140; 3 N. B. R., 302.

But instead of following up their appeal by entering the same in this court, and filing therewith within the ten days limited therefor, a statement in writing of their claim, setting forth the same substantially, as in a declaration for the same cause of action at law, to which the assignee should plead, and the cause proceed to trial as in actions at law commenced and prosecuted in the usual manner in this court, which by Section 24 of the act, and 25 of the General Orders in Bankruptcy, such claimants are required to do, they did nothing by way of statement or declaration, not even entering such appeal in this court during the said ten days, nor have they at any time since filed such statement or declaration.

Both the statute and the rule requires it shall be done when the appeal is entered in this court. The assignee now moves to dismiss the appeal.

I have heretofore held, *In re* Coleman, 2 N. B. R., 563, in the Northern District of New York, that non-compliance with the provisions of Sections 8 and 24, and Rule 26, were grounds of dismissing an appeal or attempted appeal to this court, and I find no reason to doubt the correctness of my decision in that case.

The counsel for the claimant appears in this case to have adopted another practice than that presented in Sections 8 and 24, for the review of the decision made by the District Court, after the ten days had expired, allowed to perfect the appeal, and on the 16th day of July he filed a petition for the review of that decision, as in cases provided for in Section 2 of the act. In this he has overlooked, or has not fully considered, the language of that section. The power of review given by that section is broad; but the mode of review by petition, bill, etc., there mentioned, is expressly confined to cases in which no special provision is otherwise made.

For the case of persons claiming to be creditors, but whose claims are on the one hand rejected, or on the other allowed, special provision is made by Sections 8 and 24, and these sections contemplate not a review of the adjudication in the District Court, but a trial of the questions of fact by a jury upon

pleadings and an issue, or an issue of law if there shall be a demurrer. It was plainly intended to give to the party claiming to be a creditor, and to the assignee contesting a claim, the privilege of such a trial. It is suggested that the claimants should now be permitted to treat the petition for a review as such a statement as the statute requires.

If the objection that it was not filed within the ten days prescribed by the General Orders in bankruptcy could be obviated by the assumption by this court of a right to extend the rule, or relieve from the consequences of disregarding it, it will not avail the appellants. The petition for review is neither, in form or substance, a declaration upon the supposed cause of action, to which the assignee can plead and go to trial. It is a statement of what took place in the District Court, and avers that the proceedings there are erroneous; it requires that the proceedings in that court be brought into this court for examination, not upon any issue which can be tried by a jury, but upon the record and minutes of the proceedings; and accordingly the clerk of that court has returned these proceedings, and they are placed before me on this motion. If any further contest was to be had after the rejection of the claim, the assignee had the right that it not only be expedited in accordance with the general design of the Bankrupt Law to bring the settlement of estates to a conclusion as speedily as practicable, but also to have the further examination of the claim conducted like an ordinary action at law, in which, if the facts are disputed, there may be a trial by jury.

The appeal must be dismissed.

F. N. Bangs, for the assignee, respondent.

T. C. T. Buckley, for C. P. Fisher & Co., appellants.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

An adjudication of bankruptcy terminates the interest of the bankrupt in any policy of insurance, and the policy is thenceforth void and of no effect; but an insurance company may consent to continue their liability

by the usual transfer of the policy to the Register in charge of the bankruptcy proceedings, until an assignee shall have been appointed, and may also transfer said policy to the assignee when appointed. It is optional with the company to continue the risk by such transfers, or to cancel the same. The title to the property of a bankrupt, by operation of law vests in the Register as Register, although the property may be in the possession of the United States Marshal as messenger, it is still in the possession of the court, and the Register is, by the Bankrupt Law, the court.

The United States Marshal and assignee are officers of the court, and must obey the orders of the Register, and their necessary expenses and disbursements made by them in the protection of the property of the bankrupt's estate, must be taxed by the Register and paid out of the estate.

In re CAROW.

THIS cause is now pending before me. The said Carow has been duly adjudicated a bankrupt by the District Court. The United States marshal, as messenger, has seized, attached, and has in his possession, under the order of this court, three ships, claims of indebtedness to the bankrupt, and other property, claimed by creditors to be the property of the estate of the bankrupt. It is satisfactorily shown to me by creditors and by the said United States marshal, that these ships are estimated to be worth from eighty to one hundred thousand dollars or more, subject to liens and incumbrances. It appears, by the schedules of the said bankrupt, that the said three ships were previously insured in various companies, and that notes of the bankrupt were given in payment of said insurance, which notes have not been paid, and are set out in said schedule as part of the indebtedness of the said bankrupt.

I decide as a matter of law that the adjudication of this court, declaring the said Carow a bankrupt, ended the liability of the companies upon their policies, unless they saw fit, at the request of the Register in Bankruptcy or the United States marshal as messenger, in writing, to consent to continue their liability under said policies by the usual consent and transfer of said policies from the said Carow to the said Register or marshal, on account of the creditors of the estate, until an assignee shall have been appointed, and then it would be optional with the companies to continue the risks by transfers to the assignee or to cancel the same.

The interest of the assured in a policy ceases with any transfer thereof. An adjudication of bankruptcy by operation of law transfers the interest of the bankrupt in a policy to the Register. The policy is not assignable without the consent of the company in writing. The assignment of the policy to the Register to be of any benefit to the estate, must be with the consent of the company in writing, and without such consent the policy, after such adjudication, would be void and of no effect, as an assignment without consent of the company avoids the policy. *Smith* v. *The Saratoga County Mutual Fire Insurance Company*, 1 Hill, 497.

It is not necessary that the bankrupt should *pro forma* assign the policy to the Register, as the Register takes it by operation of law.

The filing of a petition in bankruptcy at once brings the property of the insolvent into the bankruptcy court, and places it in its custody and under its protection as fully as if actually brought into the visible presence of the court.

I hold it to be my duty and that I am required by law, to protect the interest of the creditors, or by an order of this court to direct the United States Marshal to cause the said ships to be properly insured, in safe and responsible insurance companies, as by the Bankrupt Law the title of the property and estate of the bankrupt upon the adjudication and order of reference to the Register, by operation of law, at once vests in the Register as Register; and although in the actual possession of the United States Marshal as messenger, it is still in the possession of the court, and he will be protected in his obedience to its orders by the court. His expenses, disbursements, and costs are taxed and allowed by the Register (Rule 5). The Register has the power to order the payment of fees and expenses incurred in the proceedings out of the funds in the hands of the assignee. (*In re* Lane, 2 N. B. R., 309.) He may appoint a watchman to take charge of the property. (*In re* Bogert *et al.*, 2 N. B. R., 585; *in re* Shafer *et al.*, 2 N. B. R., 587.) He is authorized and required to receive the surrender of property and keep it safely until it can be turned over

to the assignee. (*In re* Hasbrouck, 1 N. B. R., 75.) In this case the money necessary to pay for the insurance will have to be advanced by the marshal, and be allowed to the marshal in his bill of costs, with a fair compensation for the use of it, to be allowed and taxed by the Register and paid out of the proceeds of the estate.

I hold it to be the duty of the Register to exercise a sound discretion in regard to the direction to be given in regard to estates in bankruptcy, that all insurable property should be properly insured and properly cared for in every respect; that the Register is, as it were, the guardian and protector of the property in the possession of the court, and under its control, and the marshal, as an officer of the court, is also under its control, as it was held in the case of *In re* Glaser, 1 N. B. R., 336, Blatchford, J., that District Courts had original jurisdiction in all matters and proceedings in bankruptcy, and that that jurisdisdiction extends to all acts, matters, and things to be done under and in virtue of the bankruptcy. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer (assignee or trustee) appointed to manage it, is accountable to the court appointing him and to that court alone. *In re* Barrow, *re* Loeb, Simon & Co., *re* Winter, 1 N. B. R., 385; *in re* Schnepf, B. R. Sup. 41; *in re* Bowie, 1 N. B. R., 626. The commencement of proceedings in bankruptcy at once transfers to the District Court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith. *Jones* v. *Leach et al.*, 1 N. B. R., 595; *Pennington* v. *Sale, Phelon et al.*, 1 N. B. R., 572; *in re* Kingon, 38 How. P. Rep., 392, and the authorities there cited.

The United States Marshal, as messenger, is an officer of the court and subject to its authority and control, and must obey its orders and directions as well as such officer can, for the interests of the creditors, and also have a care that the interests of the bankrupt shall be protected, and that his property shall be so managed as to realize the largest amount attainable, both for the interest of the creditors, and that the bankrupt may, by

such judicious management of his property and effects, come within the provision of the fifty per cent. clause. In order to afford the marshal, as messenger, full protection and guarantee by order of the District Court from loss by reason of his advance for premiums upon the policies of insurance, I propose to grant the following order in this cause:

"That the United States Marshal cause to be insured the three ships now in possession under and by virtue of an order of this court, viz.: *Polar Star*, *Tri Mountain*, and *Edith*; that he cause to be insured the *Polar Star* at the sum of sixteen thousand dollars, the *Tri Mountain* at twenty-six thousand dollars, and the *Edith* at forty-five thousand dollars, or as near those sums as he can procure insurance on them respectively, in safe, solvent, and responsible insurance companies in the State of New York, upon reasonable and proper terms as to rates of insurance for the space of two months," which, as the order of this court, will afford the marshal ample protection, and at the same time secure the creditors the value of the property in case of loss, and also secure the other claimants and all those having prior liens or admiralty liens which may have become vested rights prior to the adjudication in bankruptcy. In any event the policies should be so worded as to cover the interests of all concerned.

As this is a question as to the power of the Register in involuntary cases to cause proper care to be taken of property, I ask the direction of the District Court as to the issue of the order to the United States Marshal, as the marshal desires the protection and direction of the court in this matter, there being adverse claimants of the property to be insured, and the attorneys for the bankrupt claim that the bankrupt had neither right, title, nor interest in the ships, and that this Court in Bankruptcy has not, by any proceedings in this cause, acquired any jurisdiction over the same. I certify the same to the court.

BLATCHFORD, J.—If the marshal, as messenger, has these ships in his possession and actual custody as the property of

the bankrupt, it is proper they should be insured in such sums and for such time as shall seem to the Register proper. In that view, and on the certificate of the Register, the annexed proposed order is approved.

UNITED STATES DISTRICT COURT—MARYLAND.

Judgments are not to be set aside as fraudulent and void merely because the plaintiff has exacted a high rate of interest, especially when at the time of entering of the judgments, valuable collateral securities were surrendered to debtor by plaintiff for a large part of said judgments.

A judgment is fraudulent and void, if the plaintiff knew at the time it was entered up, that the debtor had executed a deed of assignment to said plaintiff and another party.

In a mercantile community the non-payment of a note at maturity by the maker, who is a merchant or trader, is *prima facie* evidence of insolvency, and warrants a decree in bankruptcy. In an agricultural country the rule is different, and there no man is suspected of being insolvent from the fact alone that his notes are not paid promptly at maturity.

Notes given for the excess or bonus over legal interest are not provable in bankruptcy, and must be surrendered to the assignee.

Shaffer *v.* Fritchery & Thomas.

Giles, J.—The bill in this cause was filed 27th of September, 1869. It sets forth that the said Shaffer, being insolvent, gave to respondents the orders or warrants to enter four judgments against him in the Circuit Court for Carroll county, at the several times mentioned in the said bill of complaint, the first one being entered on the 5th day of February, 1869, and which was for the sum of six thousand dollars; the second one on the 1st of April, 1869, for three thousand and ninety-seven dollars and fifty-seven cents; the third one on April 12th, 1869, for three thousand one hundred and nineteen dollars; and the fourth, and last one, on 14th of April, 1869, for five hundred and thirty dollars. The bill charges that these judgments were confessed by Schaffer, with intent to give a preference to said defendants over his other creditors, and to defeat the operation, and in fraud of the provisions of the Bankrupt Act; and that, when said judgments were entered, the

said defendants had reasonable cause to believe that a fraud on this act was intended, and that Shaffer was insolvent.

The bill also charges that said judgments were confessed for a much larger amount than Shaffer owed to the defendants; the amount of said judgments being about thirteen thousand dollars, and the true indebtedness of said Shaffer to defendants was less than eight thousand dollars; and that said judgments are fraudulent in fact, as well as void under the 35th and 39th Sections of the Bankrupt Act. And it concludes with a prayer that the said judgments may be decreed void, and be set aside; or, if the court should decide that they have no authority to pass such a decree, that the defendants may be restrained from asserting any priority under them to payment from the assets of said bankrupt's estate, and for such order and further relief as the case may require.

The answer denies all the material allegations of the bill. They admit the confession of the four judgments mentioned in the said bill, but they deny that at the several times said judgments were confessed, they had any reasonable cause to believe, or that they, in fact, believed that said Shaffer was insolvent, and that the same were confessed with intent to give them a preference; and they also deny that the said judgments do not represent truly the amount of the indebtedness of said bankrupt to them, but that said bankrupt was then and is still justly indebted to them in the several amounts stated in said judgments, and they deny all charges of fraud. The answer then states the course of dealing between the said bankrupt and these respondents (who were bankers and brokers in Westminster, in this State), and the origin of said indebtedness and its character when the said several judgments were confessed; and the said answer further states that when said first judgment was confessed, these defendants surrendered to Shaffer certain securities, being the indorsements of other parties, and which securities they regarded as ample, being satisfied with the said judgment in lieu thereof; and the answer insists that said judgments are valid and a lien on the real estate of said bankrupt, and they pray that the court will so decree, and that, if the said

real estate shall be sold by the assignee, that he shall be directed to pay off the said judgments, etc.

Under the issues, therefore, clearly made by the said bill and answer, a large amount of testimony had been taken, and the case has been fully and ably argued by learned counsel. At the commencement of his argument one of the learned counsel for the defendants suggested a doubt whether, at this time, the court has any jurisdiction of this case to decree the relief prayed. But the court has no doubt on this point. When this bill was filed, the real estate had not been sold by the assignee; and if he believed that there were liens upon the same which were fraudulent and void, it was his duty to have them removed; and although this court had passed an order, on the petition of the said assignee, on the 10th day of September, authorizing him to sell the real estate of the said bankrupt, free and discharged from the liens on the same, and from the proceeds of sale to discharge the liens thereon, there was still more necessity that the power of this court should be invoked to ascertain what liens existed, and to pass upon their validity. Whether this authority of the court is asked by bill in equity or by summary petition, can make no difference; as, under the 1st Section of the Bankrupt Act, this court has full jurisdiction over the subject-matter. Still, I think a bill in equity is the most suitable remedy.

There are four judgments sought to be set aside in this case, of different dates; and it might well be that one or more might be valid, and others fraudulent and void. It will be necessary, therefore, to examine the evidence in relation to each one separately. The first one was entered up on the 5th of February, 1869, for six thousand dollars. Now, at this time, was Shaffer insolvent? I have no doubt that he was. His whole assets, as ascertained by the subsequent sales, were only about twenty-five thousand seven hundred and fifty dollars, while his indebtedness must have been at least over thirty-five thousand dollars, and it might have been much more, for we find him, on the 13th of April, 1869, making a deed of trust to certain parties for the benefit of his creditors; and there is no proof that

between the 5th of February and the 13th of April he met with any losses in his business or otherwise.

Then the next question is, when this judgment was taken had defendants reasonable cause to believe that Shaffer was insolvent, and that by the confession of said judgment a fraud on the Bankrupt Act was intended? Now, it is proved, beyond any doubt, that up to the execution of the deed of trust Shaffer was in good credit in the county in which he resided; that he owned a large real estate, and was computed to be worth from twenty-five to thirty thousand dollars; that prior to the first judgment of defendants the only debt of his of which the community generally could have had any knowledge, were Cover's judgment for four thousand dollars and the mortgage on the mill property for two thousand six hundred and fifty-nine dollars and forty-one cents, making six thousand six hundred and fifty-nine dollars and forty-one cents.

Now, in all the facts attending the transactions between Shaffer and defendants, what cause was there to suspect the solvency of Shaffer, and that he contemplated a fraud on the Bankrupt Act? The fact that he did not pay his notes punctually at maturity, and that he agreed to pay heavy interest on the cash advanced to him, are relied on by the counsel for the complaint to show a knowledge by the defendants of Shaffer's true condition. Now, if these transactions had taken place in a mercantile community, or the bankrupt had been a merchant, the non-payment of his note would have been *prima facie* evidence of insolvency, and would have warranted a decree in bankruptcy against him. And if defendants, after such non-payment, took from him a judgment to secure either past indebtedness, or that, with a present advance, they would have done so at their peril. But in an agricultural community the rule is different. And it is proved in this case, that in the county where these parties resided, the general experience is that notes are not paid punctually at maturity; and that no man is suspected of being insolvent from the fact alone that his notes are not punctually paid. Now as to the fact of the charge of three per cent. a month for many of the advances

made by defendants, this, if standing alone, would certainly raise a presumption of defendants' knowledge of the embarrassed condition of Shaffer, sufficient to put them on inquiry. But this presumption is removed when we find them continuing to make advances to Shaffer of large sums, even so late as the 12th of April, 1869. It only shows that defendants were very sharp in all their transactions, and believing that they were dealing with a man who was responsible, with large real estate, but much in want of cash, they took advantage of his necessities to get a large interest for their money. Also, it appears from the evidence that when the first three judgments were taken, the defendants surrendered to Shaffer valuable collateral security which they held for a large part of said amounts. According to my view of the evidence, I cannot, therefore, set the first three judgments aside as fraudulent and void. The last judgment was entered up on the 14th of April, 1869. On the evening of the 13th of April a deed of trust of all his property had been executed by Shaffer to one of the defendants and another party, with the knowledge of the said defendant. With this knowledge defendants, on the 14th of April, 1869, caused to be entered the judgment of that date, and I, therefore, hold it to be fraudulent and void, and will so decree. It remains only for me to ascertain how much money was actually advanced to said Shaffer by defendants, and to secure the payment of which the remaining judgments were confessed; for that amount alone, with six per cent. interest on the same, will these defendants be permitted to prove said judgments against Shaffer's estate, and to obtain judgment of the same, according to the legal priority of said judgments. By the laws of this State, where the defense of usury is taken, the party *taking* it forfeits only the excess above the sum loaned and the legal interest (six per cent.) on the same. Now, this is a matter of no slight difficulty, from the mass of evidence in this case, and from the want of recollection of Shaffer upon the subject; and also from the fact, apparent on the books of the defendants, given in evidence on the call of the complainant, that sometimes the discount was paid in cash, but more generally notes

were taken for the same, which were renewed from time to time, and were subsequently merged in the large notes for which the judgments were entered. This interest seems to have been usually three per cent. a month. If the learned counsel can agree upon the amount of the interest thus charged beyond six per cent., I will deduct the same from the three judgments and permit the defendants to prove the same for the balance. If they cannot agree, I will ascertain the amount myself, from the best data I can obtain from the evidence, which is anything but clear on this point.

The three bonus notes filed in this cause the court holds to be void, and they will be decreed to be surrendered to the assignee.

UNITED STATES DISTRICT COURT—RHODE ISLAND.

Where money was deposited in court to the credit of a person against whom a warrant for adjudication of bankruptcy had been issued, and the funds had thereby been lodged in court without prejudice to the rights of creditors or of a mortgagee, the legal intendment of such deposit would be that the rights of the assignee on the one side, and of the mortgagee on the other, should be adjudicated according to the law and the usage of the court.

A petition to a court to order a distribution of a fund lodged in its Registry, is not regarded as an action or suit within the meaning of the 2d Section of the Bankrupt Law.

Ordered, that the petition must stand for a hearing on its merits.

In re Masterson.

Knowles, J.—On the 19th of June, 1868, a warrant in bankruptcy was issued against one John Masterson, on the application of Sheldon, Kelly & Hale, creditors, and on the same day an auxiliary injunction was granted against said Masterson, and one John P. Cooney, and Doyle & Joslon, auctioneers, forbidding a sale by them, or either of them, of certain personal property, then advertised to be sold at auction on the 20th of June, in virtue of a mortgage conveyance from said Masterson to said Cooney, bearing date March 7th, 1868.

Service of the injunction was made on the 20th, and the

proposed sale postponed or abandoned, the property remaining, so far as appears, in the custody and charge of the mortgagee Cooney, the alleged bankrupt, Masterson, having absconded.

On the return day of the warrant, the 27th of June, Masterson was adjudged a bankrupt on default; and on the same day it was agreed in writing between the petitioning creditors and the same Cooney, that the marshal or messenger should make sale of the said property at auction, at as early a day as he should see fit, the net "proceeds of sale to be brought into court, and held in lieu of the property." Under an order of court, pursuant to this agreement, the property was sold on the 2d of July by the marshal, who, on the 18th of July made return of his proceedings, paying into the Registry as said net proceeds, three hundred and sixty-eight dollars and four cents.

On the 28th of July said Cooney filed a petition to the court, representing that the mortgage aforesaid was a valid and unimpeachable lien upon the property described, and praying an order from the court that the aforesaid should be paid over to him out of the Registry.

So far as is shown by the record, this petition was not brought to the notice of the court until the 3d of February, 1869, when a hearing was indefinitely deferred at the instance of the petitioning creditors on account of the absence of a witness. Nor does it appear that action was afterwards invoked until the 1st of February, 1871, when a motion of the creditors, filed November 2d, 1870, that the said petition of Cooney be dismissed for want of jurisdiction, was called up for determination.

In support of the motion, the learned counsel cited as a binding and conclusive precedent, the MSS. opinion of this court, delivered in October last, *in re Boutour* v. *Peckham, Assignee, et al.*, dismissing a petition for want of jurisdiction, the court holding that by a suit in equity or by an action at law, and not by a petition merely, should the petitioner have sought redress or relief; electing to follow, as to this point, the rulings of Justice Nelson, Chief Justice Chase, and (as under-

stood) of Justice Clifford, rather than that of Justice Swayne. And as this court has as yet seen no reason to retract or qualify its opinion in the case cited, it is manifest that the judgment in this case should be the same as was the judgment in that, if, as contended, the two cases are in contemplation of law the counterparts each of the other, of the same species as well as of the same genus.

Herein, however, I am constrained to differ with the learned counsel of the creditors. In the case of *Boutour* v. *Peckham, Assignee, et al.*, the property in question was in the hands of the assignee, Boutour being simply an outside creditor, claiming to have a valid lien upon the property, by virtue of unrecorded mortgages, for a demand against the bankrupt firm, the which demand he had not presented for registration. This petition was against both the assignee and a secured mortgagee, claiming the property as his under the mortgage, and praying a judgment of the court, establishing his claim, and an order to the assignee to surrender to him the property. This controversy between him and the respondents the court held was one of that species which the Bankrupt Act contemplates shall be settled by a suit in equity or action at law in *either* the District or the Circuit Court, with a right in either party to test the rulings of the District Judge or of the Circuit Judge by an appeal or writ of error. (Bankrupt Law, Sections 2, 8, and 9.) It was not, the court held, one of that other species which the law contemplated should be submitted by a simple petition to the court, to be passed upon summarily as it were by a District Judge at chambers or in open court, subject only to the revisory action of a Circuit Judge "in term time or vacation," under the provisions of the 2d Section of the Bankrupt Law, in relation to which Justice Clifford and Judge Shipley, in *Littlefield* v. *Canal Company*, 4 N. B. R., 258, thus spake:

"Appeals in equity suits and in causes of admiralty and maritime jurisdiction, vacate the respective decrees in the subordinate courts, and remove the whole record into the court of paramount jurisdiction; but nothing of the kind is done in a

proceeding by petition under the 2d Section of the Bankrupt Act. * * * Nor is the allegation by a petitioner that he is aggrieved, sufficient, unless it be also alleged in what the error consists, whether of law or fact, and the nature of the error should be distinctly stated for the information of the Appellate Court, and as a matter of notice to the opposite party. Appellate Courts, even in appeals, proceed upon the ground that the decree in the subordinate court was correct, and the burden to show error is upon the appellant. (*The Baltimore*, 8 Wall, 378.) Matters of fact as well as matters of law, may doubtless be revised in the Circuit Court; but it was not the intention of Congress, in this form of proceeding, to give a party a second trial merely as such, but to secure to him an appellate tribunal for the re-examination and revision of the rulings, orders, and decrees of the District Courts, and for the reversal of the same in case they are found to be erroneous."

In the case at bar, as is already shown, the property in question was, by agreement of the creditors and the mortgagee, sold by the messenger before the 21st of July, when an assignee was appointed and the proceeds deposited in the Registry of the court, and in the Registry has the money remained, unclaimed by any one save by the petitioner. Not only has the money never yet passed into the hands of the assignee as assets of the bankrupt, but no claim to it has he ever asserted in any manner cognizable by the court, its legal and only custodian. The agreement, it will be noted, was not that the proceeds be paid over to the assignee as monies to which his title was conceded to be *prima facie* paramount, but were to be brought into court—*i. e.* paid into the Registry, whence it could not be removed, as the parties must be presumed to have known, save upon an order of the court authorizing a check therefor, to be signed by the clerk as clerk, and countersigned by the District Judge as judge. The results of the proceedings were, in my judgment, simply to lodge the funds in the court, without prejudice to the rights of creditors or of the mortgagee, an essential part of the agreement between the parties being, in legal intendment, that the claim of the assignee on the one side and of

the mortgagee on the other, should be adjudicated by the court according to the law and usage of the court in cases of deposits in its Registry. The money, it appears, was deposited to the credit of John Masterson, and on the appointment of an assignee, that officer was of course vested with all the rights of Masterson and of his creditors in the fund, as it then was in the Registry, subject to the claim of the mortgagee, Cooney. Either party could at any time, by petition or motion, prefer his claim to it, whereupon it would become the court's duty, after causing proper notice to be given to whomsoever it might deem proper, to pass upon such petition or motion. The dismissal of it would not necessarily establish the title of any contesting party. The court might well adjudge that the petitioner, A, had failed to establish his right, and dismiss his petition, retaining custody of the fund until some other petitioner, maybe a second, maybe a fiftieth, should establish his right satisfactorily to the court.

Accordingly, I must hold that, by this agreement, sanctioned as it was by an order of the court, the parties submitted their matters in dispute to the decision of the court, upon petition to be filed, waiving their respective rights to institute proceedings in equity or at law, either in the District or the Circuit Court. Such, obviously, was the intent of the parties. At the date of that agreement, the rulings of Justice Swayne, *in re* John C. Neal, 2 N. B. R., 241, were recognized as authoritative by the bar in this district, and redress or relief in nearly all cases arising under the Bankrupt Law was sought by petition, that being, evidently, as held by that learned judge, "a cheaper, speedier, and more simple mode" than proceedings at law or in equity, according to established usages and existing laws. And in harmony with this hypothesis has been the conduct of the parties. Within a week after the deposit of the money, and the appointment of an assignee, the mortgagee, Cooney, files his petition to the court, and on the 3d of February, 1869, the creditors, without objection to the form of proceedings, ask delay of trial, that they may procure the evidence of one of the petitioning creditors; and thereafter, until

the 2d of November, 1870, nearly two years, they permit the case to stand upon a docket, which was actually or constructively called for trial on the first Wednesday of every month, without motion to the court, or suggestion of error of process, or of misapprehension of rights, to the petitioner. These are not insignificant facts, regarded as bearing upon the intent of the parties to the agreement of June 27, 1868; nor is it an insignificant fact, that at this late day it may be questioned if either the assignee or petitioner can bring any action or suit. The Bankrupt Law, 2d Section, expressly bars all actions or suits by or against any assignee, unless brought within two years from the time the cause of action accrued.

The motion or petition of the creditors, Sheldon, Kelly & Hale, that the petition of Cooney, mortgagee, be dismissed for want of jurisdiction, is overruled or denied, and the petition last named must stand for hearing upon its merits. When the assignee of the bankrupt, Masterson, shall see fit to file his petition that the money in the Registry be paid over to him, it will become the court's duty to pass upon his claims, as against Cooney, as well as all other contestants. A petition to a court to order a distribution of a fund lodged in its Registry, I do not, as at present advised, regard as an action or suit within the meaning of the clause above quoted from the 2d Section of the Bankrupt Law.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where the questions certified to a United States District Judge in bankruptcy only contain abstract questions, and do not arise in the course of the bankruptcy proceedings, or upon the result of such proceedings, and are certified in behalf of a person who is not a party in the Bankrupt Court, such questions not being certified as authorized by the act, they will be returned undecided, for the reason that a decision on them would be of no force or effect.

In re HASKELL.

CERTIFICATE OF THE REGISTER.

I, BENJAMIN J. BROWN, one of the Registers of said Court in Bankruptcy, do hereby certify, that in the course of the pro-

ceedings in said matter before me, certain questions arose pertinent to the said proceedings, and were, with the facts upon which the same are based, stated and agreed to by the opposing parties, to wit: by Marston and Hatch, attorneys for John Oliver, and Solomon B. Bliss, for assignee, which statement is hereto annexed.

Upon the first question presented, viz.: Is it necessary that a mortgage creditor should prove his debt before making application for leave to sell the mortgaged premises? there has been a decision of this court, to the effect that such proof is not necessary. *In re* High, 3 N. B. R., 191. But the subsequent practice has not been uniform, I understand, and the question is, therefore, certified for the opinion of the court.

The proving of the claim, in such a case, does not seem to the undersigned to be either necessary or proper.

First. Because the nature, amount, and consideration of the debt, and all particulars respecting the same, can be equally well verified by the petition, of which the assignee should have notice, and in case of dispute can be determined upon the hearing.

Second. If a formal proof of claim is made and filed, the question will arise whether it should be recognized by the Register on the final dividend, if the sale has not then been made.

A general survey of the provisions of the Bankrupt Act confirms this opinion. While the act vests in the District Court the power to regulate *the time* when mortgaged premises may be sold "so as to secure the rights of all parties, and due distribution of the assets among all the creditors" (Section 1), it does not assume to deprive the State courts of jurisdiction, or to say that the "manner of sale according to the terms of the decree" shall be interfered with. The sale, under a decree of a State court, in nowise connects itself with proof of the claim, unless the mortgagee submits to the jurisdiction of the District Court, and seeks to make such proof; and the court should, under Section 20, "direct" the sale to be made in such "manner."

But Section 20 contemplates a summary proceeding, a sale under the *direction* of the District Court, not by virtue of the decree of a State court, and unless the property is *so sold*, the creditor cannot prove "any part of his debt." If, then, the court does not "direct" the manner of sale, but *permits* the sale to be made at such *time* as may appear to be most advantageous to the great body of creditors, the provisions of the act relative to proof of debts would not appear applicable to the case under consideration.

I think the application for leave to sell will be reasonable if made at any time before decree.

Third. I am of opinion that leave of the court should in all cases be applied for, and that the assent of the assignee is not sufficient. The records of the court should show that the sale is authorized from considerations of public policy, if for no other reason.

BENJ. J. BROWN, *Register.*

QUESTIONS AND STATEMENT OF FACTS UPON WHICH THE SAME ARE BASED.

To Hon. Benj. J. Brown, Register in Bankruptcy:

The undersigned respectfully ask you to certify the following questions to the District Court of said district for its decision thereon:

First. Is it necessary that the mortgage creditor hereinafter mentioned, should prove his debt before making application for leave to sell mortgaged premises?

Second. Will an application made at any time before decree in the cause hereinafter mentioned be reasonable?

Third. If the assignee assents to a sale of the premises hereinafter mentioned, being made under such decree, is any action of the said District Court necessary to make such sale valid, and to cut off any right of redemption?

The following are the facts upon which such questions arise:

On the 1st day of September, 1868, said Stephen V. Has-

kell, being indebted to John Oliver in the sum of one thousand dollars, executed and delivered his promissory note therefor to said Oliver, due one year after date; and further, to secure said indebtedness, said Haskell executed and delivered to said Oliver a mortgage upon the following described piece or parcel of land situated in Iosco county, State of Michigan, to wit: Lot No. Three (3) in Block No. Four (4) in the village of Tawas City, Michigan, according to the recorded plat of said village. Said mortgage was duly recorded in the office of the Register of Deeds for Iosco county, on the 29th day of September, 1868. On the 22d day of October, 1870, said Oliver filed his bill in the Circuit Court for the county of Iosco, in chancery, praying that said mortgage might be foreclosed, and the premises sold to satisfy said mortgage.

The said bankrupt and the assignee in bankruptcy were made parties defendant to said bill.

There are other mortgages on said property given subsequent to the mortgage to Oliver, and the amount of such mortgages exceeds the value of said property. The value of the premises is about fifteen hundred dollars.

MARSTON & HATCH, attorneys for Oliver.
SOLOMON B. BLISS, for assignee, etc.

LONGYEAR, J.—The "point or matter" above certified, does not appear to have arisen "during the proceedings before the Register" or "in the course of such proceedings, or upon the result of such proceedings," within the meaning of Section 6 of the Bankrupt Act. Neither is it a statement of "any question or questions in a special case" within the meaning of said section. Neither is Oliver, for whose benefit the opinion of the District Judge is sought, a "party" to the bankruptcy proceedings, nor to any proceedings whatever commenced and pending before the Register.

The questions certified are really nothing more than abstract questions; and, instead of being questions arising in the course of any proceedings in the Bankrupt Court, or upon the result of any such proceedings, they, in fact, relate merely to proceed-

ings in a suit in another and different court, and are certified in behalf of a person, who, although a party to such latter proceedings, is not a party to any proceedings in the Bankrupt Court. It may be said that the questions agreed on and stated make "a special case" within the meaning of Section 6. But this is not the provision of the section. It is not that parties may *make* a special case, but it is that they may "state any question or questions *in* a special case." There must, of course, be, first, parties, and, second, a case in which questions can arise and be stated. Here both of these elements are wanting. Questions are to be decided only when they necessarily arise, and are not to be anticipated.

If Oliver had proved his debt (as a secured debt, of course), and thus became a party to the bankruptcy proceedings, and had then applied for leave to sell the mortgaged property, and thus have made a special case, there is no doubt that questions arising therein might be stated by consent, and be properly certified; but I do not see how it could be done, short of this, under the law.

See *in re* Frizelle, 5 N. B. R. 122; *in re* Wright, 1 N. B. R., 393; *in re* Sturgeon, 1 N. B. R., 498; *in re* Bray, 2 N. B. R., 139.

The questions certified not being authorized by the act to be certified, a decision upon them would be *coram non judice*, and, of course, of no force or effect, and they are, therefore, returned undecided.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Although the court has, in furtherance of justice, the discretion at any stage of proceedings to permit amendments to be made to pleadings, it is a discretion properly limited to the same cause of action, and it should not permit, under forms of "amendments," new causes of action to be introduced.

If there is not proof sufficient to make it appear that the acts of bankruptcy charged have been committed, no order on the defendant to show cause should be granted, nor an order of seizure, injunction, or arrest.

The Bankrupt Law is intended to uphold amongst bankers, merchants, etc.,

prompt payment of commercial obligations, but it should not be perverted to the purpose of wrong and injustice by compelling honest debtors, under apprehension, to yield to unjust exactions from alleged creditors.

A debtor or defendant has the right to know what are the allegations which are made against him, and may insist that he shall not be tried on charges not made against him in the original proceedings upon which he has joined issue, and especially that he shall not be called upon just before trial to meet an entirely distinct cause of action.

Amendments in legal proceedings always presuppose something to amend—something in the record concerning that distinct substantive matter—not an entirely new cause of action to be substituted for the original one. Substitution is not amendment. The defendant may assent to the incorporation of new causes or acts of bankruptcy into the original petition. If consent is withheld, leave should be refused.

In re Leonard.

On the 7th of January, 1871, a creditor's petition, with proofs, was filed against defendant, praying that he be adjudged a bankrupt, etc.

Thereupon a rule upon him to show cause was granted. He appeared, answered, and demanded a jury, and the parties proceeded to take testimony upon the issues made.

Within a few days of the time for trial the creditors asked leave to file an amended petition, alleging additional acts of bankruptcy, without notice to the defendant or his attorney. The court granted leave, subject to any objection the defendant might make. He now files his objection in writing, and moves to strike out said amended petition.

Treat, J.—While it is in the discretion of the court at any stage of proceedings, in *furtherance of justice*, to permit amendments to be made to pleadings, it is a discretion properly limited to the same cause of action—not to permit, under form of "amendments," new causes of action to be introduced, thus perverting the power to *amend* into a power to *substitute* one cause of action for another.

The petitioning creditor, like a plaintiff, brings a definite cause of action, and makes his allegations accordingly, and the *allegata* and *probata* must correspond at the trial. The defendant appears to meet the allegations made, and no others. If there has been an informal or imperfect statement, the court

can permit the needed corrections to be made on such terms as justice demands; but it would be an unjust and unjustifiable action on its part to convert, under the name of an amendment, one cause of action into another entirely distinct, calling for different proofs and for different proceedings.

In ordinary actions at law and in equity, the rule is universally recognized, and instead of prescribing a different rule in bankruptcy, there are cogent reasons for enforcing it strictly.

When a creditor's petition is filed and proofs submitted to the judge, if he grants an order to show cause why the defendant should not be adjudged a bankrupt upon the alleged acts of bankruptcy, the very terms of the Bankrupt Act require that, on the trial, the defendant shall prove that the facts set forth in the petition are *not* true.

That provision of the act manifestly depends for explanation on the proceeding, whereby upon the filing of the petition it must be "made to appear" to the court "that sufficient grounds exist" therefor; in other words, that a *prima facie* case has been established by the proofs offered to sustain the allegations made. It would otherwise be abhorrent to the sense of justice and right that the very stringent proceedings connected often with the creditor's petition should be admissible, viz.: seizure of his property, injunctions, and arrest.

If there is not proof sufficient to make it appear that the acts of bankruptcy charged have been committed, no order on the defendant to show cause can be granted, and the petition falls. If such proof is made *allegata* and *probata* corresponding, and the order to show cause is entered, then under proper proofs the court may even grant warrants of arrest and seizure, and issue injunctions.

All of the subsequent proceedings are based on the initial proofs "that sufficient ground exists"—that is, that *prima facie*, the defendant has committed the acts of bankruptcy charged. If no such proof is submitted, no further proceedings follow—the case is at an end, and all ancillary or dependent proceedings, stringent or otherwise, fall to the ground.

If, on the other hand, the order to show cause is granted,

then defendant has cast upon him the burden of proving a *negative* (always a difficult and hard matter), unless the courts construe the act to mean that inasmuch as a *prima facie* case has been made out, the defendant is requested to rebut the same, according to the rules or proceedings familiar to judicial investigations. That construction has been uniformly given to the act by this court, and no room has been suggested which induces a doubt as to the correctness of the rulings upon the point.

It is obvious to all familiar with the operation of the act, that great care and circumspection is required on the part of the courts to prevent its perversion to purposes not within its province. It is not an act for the collection of debts under ordinary circumstances, nor to enable a creditor to hold *in terrorem* over alleged debtors its stringent provisions, so as to extort compromises or payment of doubtful or unjust demands. While it is designed to uphold among bankers, merchants, etc., prompt payment of their commercial obligations, and thus to secure to commercial paper that force which the "law merchant" requires; and while it also designs, when a debtor is insolvent, or in a state of insolvency, to secure equality among creditors, it is not to be perverted to the purpose of wrong and injustice by compelling honest debtors, under apprehension of the mischiefs to ensue, or the litigation to follow, through its potent and summary modes of proceeding, to yield to unjust exactions from alleged creditors.

If such a course should be tolerated through loose or indiscreet rulings of courts, the act, instead of being a system of equality, which is equity, would become an engine of wrong and oppression, to the destruction of commercial business and fair dealing.

The duty of courts is two-fold: to guard, on the one hand, against the perversion of forms of proceeding to the injury of honest creditors, and on the other hand, against the dishonest contrivances of insolvent debtors, and their favored creditors, to destroy the equitable principle of equality which underlies the whole system.

If the act is to be treated in its potential and summary requirements as merely formal and arbitrary, devoid of those established requirements of law whereby justice is administered in judicial tribunals, it would present formidable questions, not as to its expediency, but as to its constitutional validity.

These comments are made, not because the question presented, so far as the aspects of the case are concerned, induces any belief that wrong or injustice is now contemplated, but merely to illustrate the general views with regard to the act, in the light of which the court must rule in this case, as it has done in many others.

It may be that many cases can be cited, as often they are, on various points, which seem to differ from the conclusions reached by this court; but which, if carefully analyzed, might prove to be fairly in entire accord; but, whether reconcilable or not in all respects with what this court determines, they ought not, unless they involve rulings by the proper appelate tribunals, to cause this court to give them greater weight than, as mere persuasive authority, they are fairly and deferentially entitled to receive. In a system which to a large extent breaks in upon and overturns long settled maxims of law governing the relations of debtor and creditor, it is not remarkable that at first a wide divergence of views should exist, as to its proper construction, and as to its rightful application to the ever-shifting and diversified circumstances of the many cases arising.

Without undertaking to review the various cases wherein such a divergence of judicial opinion appears, it must suffice for the question under review to state that when a creditor resorts to the stringent provisions of this act to divest his creditor not only of the temporary control of his property, or rights of property, legal and equitable, but of all interest therein, he must specially aver the grounds of his action and prove them as averred. Ordinarily, a creditor sues his debtor for a specific sum alleged to be due, and on judgment rendered has his demand satisfied out of so much of his debtor's estate as is suffi-

cient for the purpose. On such a comparatively mild proceeding, the law exacts from the creditor a specific statement of his demand. But when the judgment to be rendered involves not merely the payment of that creditor's demand, but the seizure of all the defendant's property and rights of property, of whatsoever description or nature, and leaves him penniless, except as to the small exemption, permitted to struggle thereafter for the subsistence of himself and family, there certainly can be no adequate reason for relaxing, to his detriment, an elementary principle in judicial proceedings. He has a right to know with what act he is charged, whereby such grave consequences are invoked, and that the charges should be certain to a common intent. He has not only that right, but also the right to insist that he shall not be tried on charges not made against him, or on new charges not made in the original proceedings upon which he has joined issue, and concerning which he has taken the needed testimony for trial; especially that he shall not be called upon just before trial to meet an entirely distinct cause or causes of action. Amendments in legal proceedings always presuppose something to amend—something in the record concerning that distinct substantive matter; not that an entirely new cause of action is to be substituted for the previous one. Substitution is not amendment.

That there may have been, to some extent, informal and loose modes of proceeding under the Bankrupt Act, is possible; for, from the newness of the system, the vast number of cases, the numberless questions, incidental and otherwise, presented, and the consequent pressure of business, in many instances demanding the immediate action of the court for the preservation of the rights of those concerned, orders may have been granted which, on fuller knowledge of the facts, or maturer consideration of the legal propositions involved, would have been refused. Those ill-considered orders, if any had been made, should not be permitted to ripen into precedents.

There are due to all judicial inquiries certain requirements, sanctioned by the wisdom of ages, for the protection of all invoking the protection of courts, without which the judge and

the bench would be clothed, not with *judicial*, but with *arbitrary* authority, over the lives, liberties, and property of the people. No such arbitrary authority is compatible with a free or constitutional government, or is known to American jurisprudence.

In proceedings in bankruptcy, as in all other judicial proceedings, the court must act according to well-settled modes of judicial investigations, and also in accordance with the established law. There is no arbitrary authority vested in any court. *Discretio judicis est per leges discernere:* the discretion of a judge is a legal discretion. In the exercise of that discretion he is as much bound to follow settled rules as the chancellor is in equity to pursue the course established in equitable causes. *Misera est servitus, ubi jus est vagum aut incertum.*

It may be that a vague and ill-defined opinion obtains out of courts, that under the Bankrupt Act more arbitrary and undefined powers are vested in the judges and Registers than has existed in other judicial inquiries. If that be so, it is time the error was corrected. No judge or Register has arbitrary authority, nor is his discretion other than legal discretion. Where the rights of parties are involved judicially, the parties can justly demand that the investigation be conducted only as the known rules of law exact.

Hence, in this case, the defendant cannot have interjected into the petition against him a new cause of action. He was summoned to answer certain specific charges and no other, upon the determination of which not the rights of the petitioning creditors alone rested, but also of all creditors, and of the defendant's own estate in its entirety. If the creditor has not made true charges, the defendant has the right to be exonerated therefrom. If the original or other creditors have new charges to make, let them be made in a proper way and at the proper time. The act provides for such additional proceedings on the part of the creditors; and it also provides for the order of judicial investigation. The rules thus fixed by statute, should be enforced. There should be no judicial legislation with

respect thereto, whereby their force is to be impaired, or other, and arbitrary and unjust rules, established.

If, after the court has granted the order on a *prima facie* case made, and the burden of proving a negative has been cast on the defendant, the creditor can, by a so-called amendment, interject, without process, allegations as to new and entirely distinct acts of bankruptcy, where is the burden or proof as to said new allegations? Shall the court charge the jury that defendant must prove a negative as to the original allegations, and plaintiff as to the others? What legal right has the court to cause defendant to answer at all any allegations except in proof first submitted and deemed sufficient for the purpose? It is a mere evasion of the legal duty to permit that to be done, under color of an amendment, which it had no authority to do originally.

Without elaborating further the many elemental views which are antagonistic to the suggestions of the petitioning creditor, the court states, that the so-called amended petition in this case must be stricken from the record, and the parties held to trial on the issues joined upon the original charges preferred. In no other way can the ordinary and essential rules of judicial investigations be maintained.

Of course, where the defendant assents to the incorporation of new causes or acts of bankruptcy into the original petition, the court can permit it to be done; but such action rests on the consent of parties. If such consent is withheld, leave should be refused.

SUPREME COURT—BALTIMORE, MARYLAND.

The Act of Congress passed March 2, 1867, supersedes the State Insolvent Laws, even where the plaintiff and defendant are both citizens of the same State; hence, a discharge under the Insolvent Laws of a State is no defense to an action brought to recover an amount stated to be due on open account.

CASSARD *et al. v.* KRONER.

THIS suit was brought on the 22d of January, 1869, to the

February rule day, to recover the amount stated to be due by defendant to plaintiffs on open account; the defendant was summoned, and appeared and pleaded that he was discharged by the Circuit Court for Baltimore county upon the 18th of May, 1868, from all debts due by him at the time of the filing of his petition for the benefit of the Insolvent Laws of Maryland, on the 14th of January, 1868; to this plea there was a demurrer, and the defendant joined in the demurrer.

The demurrer raises this question. Does the Act of Congress passed 2d of March, 1867, known as the Bankrupt Law, absolutely supersede the State Insolvent Law in this case? It was admitted that the plaintiffs and defendant were all citizens of Maryland.

The Supreme Court of the United States has established these points:

"As between citizens of the same State, a discharge of a bankrupt by the laws of that State, is valid, as it affects posterior contracts; as against creditors, citizens of other States, it is invalid as to all contracts."

"That the power given to the United States to pass Bankrupt Laws is not exclusive." *Ogden* v. *Saunders*, 12 Wheaton, 369; *Boyle* v. *Zacharie & Turner*, 6 Peters, 348; *Ib.*, 6 Peters, 643.

In the recent case of *Van Nostrand* v. *Carr et al.*, determined by the Court of Appeals of Maryland at October Term, 1868, that court says, that when the legislation of Congress upon this subject has been exercised, it is paramount and exclusive, and suspends the operation of the Insolvent Laws of a State and the jurisdiction of the State Courts *over cases falling within the purview and operation of the Bankrupt Law.*

In the case now before me, inasmuch as all the parties are citizens of the same State, I must consider that this case does not fall "within the purview and operation of the Bankrupt Law," and that the discharge of the defendant under the Insolvent Laws of Maryland, is a bar to this action, and I will

direct the clerk to enter judgment on the demurrer, for the defendant.

T. PARKIN SCOTT.

J. H. & R. G. Keene, for petitioners.
Thomas A. Hopkins, for defendant.

An appeal was thereupon taken to the Supreme Bench, where, after argument, the following judgment was rendered:

SUPREME BENCH OF BALTIMORE CITY.

Cassard et al. v. *Kroner.*

From the Baltimore City Court. Appeal by plaintiff.

In the above-entitled cause, all and singular the premises being seen, and by the court here fully understood, and mature deliberation being thereupon had, and it appearing to the court that there is error in the judgment of the court below,

Therefore, it is ordered that the judgment of the Baltimore City Court be reversed, and the case remanded, with directions to the court below to enter up judgment for the plaintiff for the amount of his claim, with interest and costs.

UNITED STATES DISTRICT COURT—MARYLAND.

Where commercial paper is indorsed by a firm in its firm name, and also by the individual name of one or more members of the firm, and the makers of the note become embarrassed and bankruptcy ensues to the indorsers of the note, and the holders accept with permission of court forty per cent. from the makers, they are only entitled to dividends against the indorsers, individually, and as a firm, to an amount equal to their claim after deducting the forty per cent. received from the makers.

In bankruptcy the joint and separate estates are considered as distinct estates. A joint creditor having security on the separate estate may prove against the joint estate without relinquishing his security—may prove his whole claim against both estates and receive a dividend for each, but so as not to receive more than the full amount of his debt from both sources.

In re HOWARD, COLE & Co.

I, the undersigned, having been designated by the court as the Register in Bankruptcy, before whom the proceedings in

the above matter of the bankruptcy of Howard, Cole & Co. are to be had, do hereby certify, that in the due course of such proceedings the following questions pertinent to the same arose, and were stated and agreed to by Chapman, Lyons, Smith & Co., of New York City, and Walter B. Brooks, assignee in the above matter.

And the said parties request that the same should be certified to your Honor for your opinion thereon.

R. Stockett Mathews,
Register.

Baltimore, November 16, 1870.

Howard, Cole & Co.,
To Chapman, Lyons, Smith & Co.

Shipley, Roane & Co. Note due January 6th, 1870	$4,278 16
Interest to 22d of January, 1870	14 61
Shipley, Roane & Co.'s note due 22d of January, 1870	4,125 68
	$8,418 45
Forty per cent. settled by Shipley, Roane & Co.	3,367 38
	$5,051 07

upon which notes Geo. W. Howard and Howard, Cole & Co. are indorsers.

Chapman, Lyons, Smith & Co. proved their claim for the amount of eight thousand four hundred and eighteen dollars and forty-five cents to the separate estates of Geo. W. Howard and Howard, Cole & Co., as indorsers on said notes of Shipley, Roane & Co., Geo. W. Howard being the first indorser. On the 23d May, 1870, W. B. Brooks, assignee, declared a dividend of thirty per cent. on the estate of Howard, Cole & Co., but withheld payment thereof on these notes until Chapman, Lyons, Smith & Co. made a settlement with Shipley, Roane & Co., then in progress, but not consummated until afterwards, and said settlement is deducted from the above account, three thousand three hundred and sixty-seven dollars and thirty-eight cents. On the 13th of October, 1870, the said assignee paid said thirty per cent., amount, one thousand five hundred and fifteen dollars and thirty-two cents, to said Chapman, Lyons,

Smith & Co., which is not deducted above. The questions submitted by the assignee for his instruction are:

First. The assignee claims that he has the right to deduct the amount received by Chapman, Lyons, Smith & Co. from Shipley, Roane & Co., and to pay dividends on the balance, five thousand and fifty-five dollars and seven cents, as being the debt due by Howard, Cole & Co. and by Geo. W. Howard as indorsers.

Chapman, Lyons, Smith & Co. object to this, and claim that they are entitled to collect dividends from the estate of Howard, Cole & Co. and Geo. W. Howard on the entire debt, eight thousand four hundred and eighteen dollars and forty-five cents, until it is fully paid by said dividend and the amount received as above from Shipley, Roane & Co.

Second. The assignee is prepared to pay a second dividend out of the estate of Howard, Cole & Co., and the first dividend out of the estate of Geo. W. Howard, and the assignee has been advised that it is his duty first to deduct the two dividends paid out of the estate of Howard, Cole & Co., and on the balance remaining to declare a dividend out of the estate of Geo. W. Howard.

Chapman, Lyons, Smith & Co. object to this, and claim that they are entitled to full dividends out of the estates from Howard, Cole & Co. and Geo. W. Howard, without crediting any dividend received from the other estate until the whole debt is paid.

The Register is requested to decide the above questions or issues.

W. B. Brooks,
Assignee of Chapman, Lyons, Smith & Co.

OPINION OF THE REGISTER.

The questions presented by the statement of facts which is submitted for the direction of the court by the agreement of Mr. Brooks, the assignee, and Messrs. Chapman, Lyons & Smith, the proving creditors, are of great importance and replete with difficulty. None similar to these in all respects, have as yet

received consideration from either of the courts in which the jurisdiction granted by the Bankrupt Act and its supplements is exerted. Nor does it seem inadvisable to reduce the agreed statement of the parties to a simpler form in order that the salient point to be determined may be clearly eliminated, before an effort is made to apply to them the provisions of the statute, and the provisions bearing upon the sections involved in this examination.

First. The firm of Howard, Cole & Co., composed of Geo. W. Howard, John H. Cole, and Henry F. Schurman, was adjudicated bankrupt on their own petition, and the adjudication also specially embraced each of the individual members of the firm. The assignee appointed by the court upon the election of the creditors, took possession of the assets of the firm, and of the several estates of the individual partners. A first dividend of thirty per cent. upon the debts proved against the assets of the firm has been paid, and the assignee has called a third meeting of creditors, and is prepared to pay a second dividend upon the debts proved against the assets of the firm, and a first dividend upon the debts proved against the separate estate of Mr. Howard, one of the copartners.

Second. George W. Howard was a member of the firm of Howard, Cole & Co., as well as of the firm of Shipley, Roane & Co., but prior to the filing of the petition of the former firm in bankruptcy, he had withdrawn by the consent of his partners therein from the second firm.

Third. The notes of Shipley, Roane & Co. referred to in the statement of the parties, were used for the accommodation of Howard, Cole & Co., and were indorsed by the firm in its partnership name, as well as by Mr. Howard, one of the partners in both firms.

Fourth. Shipley, Roane & Co., or rather the continuing partners, after the withdrawal of Mr. Howard, having been compelled to stop payment through the failure of Howard, Cole & Co., sought to obtain a compromise and settlement of the debts due by them, and succeeded in arranging a composition with their creditors of forty per cent. on the amount of their respec-

tive claims, and this arrangement was consummated with the consent of the assignee under a proper order of court. It was also accepted by Chapman, Lyons, Smith & Co., one of the partners to this inquiry.

The questions evolved from these facts may be stated succinctly as follows:

First. For what amount may Chapman, Lyons, Smith & Co. prove a claim against the assets of Howard, Cole & Co.?

Second. For what amount may they prove a claim against the separate estate of George W. Howard?

Third. In computing the dividends to which they may be entitled, shall any deduction be made on account of the settlement made by them with Shipley, Roane & Co.?

If there had been no settlement with Shipley, Roane & Co., the Register would be relieved from all doubt as to the fittest mode of marshaling the assets of the joint and several estates, and the proper dividends allowable on claims against both which might be held by one and the same creditor.

The questions then could scarcely be treated as questions of first impression. They were elaborately, and, as the Register thinks, exhaustively examined by Judge Hall, *in re Mead* v. *Bank of Fayetteville*, 2 N. B. R., 173. The conclusions of that able judge were subsequently followed by Judge Blatchford, *in re* Bigelow, 2 N. B. R., 371. Both these judges hold that "the weight of American authority favor the right of a creditor who has a joint contract as to the firm, and several as to one or more of the partners, to prove against the firm and the individual partner, or partners, and to receive dividends from the joint and individual assets." They follow the rule laid down upon mature consideration by Judge Sprague, *in re* Farnum, 6 Boston Law Rep., 21. A contrary rule prevails in England, but it has not satisfied the most eminent judges and jurists of that country, and has been condemned under the Act of 1841, by Judge Story and Judge Cushing. (Story on Partnership, Section 376; 10 Cushing's Rep., 478.) The fortunate creditor holding a two-fold security is, in fact, equally a creditor of the firm, and of the individual member as in-

dorser. He may, outside of bankruptcy, pursue his remedies simultaneously against the drawer of a note, and all indorsers subsequent to its making and prior to his holding. While he can have legally but one full and complete satisfaction of the debt, he is entitled to receive that from any and all sources, nor can he be put to an election as to the person against whom he shall first proceed in extremes, or the property from which he shall first aim to recover his debt in whole or in part. The indorsement is taken as an additional security for the payment of the debt by the principal debtor, and on his default, they stand, drawer and indorser, *in pari passu*, towards the holder of their dishonored paper. Any other or different view than this, it seems to the Register, would do violence to the manifest intention of the law, not less than the plainest inferences to be drawn from some of its express provisions. The assignee of the property and assets of the copartnership is elected exclusively by the votes of the creditors of the partnership, but, when once elected, he becomes, by the specific force of the law, also the assignee of the separate estates of the several partners. And the law directs both the time and the mode of the distribution of the funds in his hands, and the application of any surplus which may remain from either source of assets towards the extinguishment of debts proven against the other estate. Section 19 of the Act (March 2, 1867), in its third paragraph, points out that proof of claim may be made against the bankrupt if he shall be bound as "indorser"—and such was Mr. Howard in his individual capacity—although the debt was one incurred by the drawers, Shipley, Roane & Co., for the accommodation of Howard, Cole & Co., the second indorser, and Mr. Howard's was equally an accommodation indorsement. But Chapman, Lyons, Smith & Co. were holders *bona fide* and for value, and it is not carrying legitimate inferences too far to add that they seem to have relied upon the first indorser, who was reputed to be a man of independent fortune, quite as much as they reposed faith in the solvency of the firm of which he was a member.

One other point remains to be noticed. The holders of the

notes offered for proof have made a composition of their claims against the drawers, Shipley, Roane & Co., at the rate of forty per centum of the aggregate amount. This settlement, as the Register is informed, was made under an order of court, expressly vesting the assignee of H., C. & Co. with authority to give his official assent to its terms. And it was made without prejudice to, or waiver of, any of the rights, with one exception, which the settling creditors then had, or might have, against the estates, either joint or separate, of the bankrupts. But in accepting such a composition the creditors meant to surrender, and in law did yield their claim, to that extent, against either or both the funds in the hands of the assignees: and Shipley, Roane & Co. became subrogated to the rights of Chapman, Lyons, Smith & Co. against the partnership funds. The latter firm have relinquished their full claim against Shipley, Roane & Co., and have assumed the hazard of their fidelity to the arrangement made with them. Clearly, then, Chapman, Lyons, Smith & Co. are creditors of Howard, Cole & Co. for no more than the sixty per centum of the original debt; to the same extent they ought to be permitted to prove their demands against the first indorser on the notes they hold, who is one of the firm of bankrupts, but not the less a separate person so far as his indorsement is concerned.

The assignee is in charge of the funds derived from all sources, separate or joint; he watches over their distribution, and can easily guard against improper or excessive payments. If the partnership proceeds will be available in the liquidation of partnership debts to the extent of fifty per centum, this amount, added to the amount of the compromise per centage, would leave but ten per cent. of the original amount still due, and the dividend from the separate estate of Mr. Howard may be adequate to its extinguishment, and may even be in excess of the deficiency. But the assignee can guard against any payment from either funds, in excess of the sixty per cent. for which either and both are liable, only to that extent. The creditors may obtain a full payment of the sixty per cent., provided the *pro rata* dividends which they share with the other creditors

shall amount in the aggregate to so much. But if the joint funds furnish only forty per cent. of the total claim against it, and the separate estate of Mr. Howard reaches only to ten per cent. of the claims proven against him, then Chapman, Lyons, Smith & Co. would lose ten per cent. of their debt. This calculation is simply used as an illustration of the views of the Register in connection with the arrangement of the creditors with Shipley, Roane & Co.

And the Register respectfully submits his opinion to the consideration of the court.

R. Stockett Mathews, *Register.*

Giles, J.—The Register, R. Stockett Mathews, Esq., to whom the case was referred, has certified into court several questions growing out of the following brief statement of facts.

The firm of Chapman, Lyons, Smith & Co. hold two promissory notes, drawn by the firm of Shipley, Roane & Co., one for four thousand two hundred and seventy-eight dollars and sixteen cents, due 6th January, 1870, and the other for four thousand one hundred and twenty-eight dollars and sixty-eight cents, due 22d January, 1870. They were payable to Geo. W. Howard, and by him indorsed, and they were also indorsed by the firm of Howard, Cole & Co., of which firm Geo. W. Howard was a member. Before the said notes reached maturity, Geo. W. Howard and the firm of Howard, Cole & Co. were decreed bankrupts. The firm of Shipley, Roane & Co., being in embarrassed circumstances, offered to compromise with their creditors upon the payment of forty cents on the dollar, and the said firm of Chapman, Lyons, Smith & Co. and other creditors of said bankrupt, asked of this court permission to accept the said proposition without prejudice to their claims against the said bankrupt, which was granted. And the said firm of Chapman, Lyons, Smith & Co. received of Shipley, Roane & Co. forty per cent. on the amount of their said notes.

On these facts three questions are certified to the court; I state them in the order in which they naturally arise.

First. On what amount will the firm of Chapman & Co. be permitted to receive a dividend from the bankrupt estate. Clearly, only on the amount of the said notes, after deducting the forty per cent. received from Shipley, Roane & Co. The second and third questions are really but one in fact, and I shall answer them together.

Although by the 36th Section of the Bankrupt Act, where partners in trade shall be adjudged bankrupts, all the joint property of the partnership, and also all the separate estate of each of the parties shall be taken; yet, in the administration in bankruptcy, the joint and separate estates are considered as distinct estates. This is perfectly clear by the rule laid down for their administration in the said section. It has therefore been held that a joint creditor having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security. He would, therefore, by the same principle, be allowed to prove his whole claim against both estates and receive a dividend from each, but so as not to receive more than the full amount of his debt.

In this case, the firm of Chapman & Co. can prove the amount of said notes (with the deduction of the forty per cent,) against both the private estate of Geo. W. Howard, and the partnership assets of Howard, Cole & Co., and receive dividends from both, the assignee taking care that from both the creditor firm does not receive more than full satisfaction of its claim. I concur, therefore, fully in the opinion which the Register has sent up in this case.

UNITED STATES CIRCUIT COURT—TEXAS.

A power of attorney, in accordance with Form No. 26, in which the concluding words are "and with like powers to attend and vote at any other meeting or meetings of creditors, or setting or sittings of the court, which may be holden therein, for any of the purposes aforesaid, or for the declaration of dividend, or for any other purpose in my interest whatever," does not authorize the filing of an opposition to the bankrupt's discharge by the attorney to whom the letter is given.

The claim that a power to attend and vote at meetings, and accept the appointment of assignee for his principal, gives the attorney authority to involve his principal in such a controversy as arises in opposition to the discharge of a bankrupt, is a misconception of the scope and purposes of the power.

The filing of an opposition to a bankrupt's discharge is the commencement of an individual proceeding on the part of the creditor against the bankrupt.

CREDITORS *v.* WILLIAMS.

WOODS, J.—This is a petition addressed to the supervisory jurisdiction of the Circuit Court, asking a review of a decision of the District Court.

W. H. & Q. H. Williams, as partners and individually, having filed their petition in bankruptcy, such proceedings were had that W. H. Williams was discharged, and on the 30th day of December, 1868, the said Q. H. Williams applied for his discharge. The attorneys of one Joseph Sauters, who was a creditor, opposed the discharge, and within the time allowed by the court filed specifications in opposition to the discharge of the bankrupt. It seems that the attorneys of other creditors had, as a matter of convenience, made an arrangement with the attorneys of Sauters, that the opposition to the discharge of the bankrupt and the specifications should be made in his name, but for the benefit of said other creditors, by whom all the expenses should be borne; and that the attorneys of Sauters and the other creditors should render mutual service in reference to said respective claims. Sauters, without notice to his own attorneys, or to the attorneys of said other creditors, on the 5th day of April, 1869, filed in the court a disclaimer of his opposition to the discharge of the bankrupt, alleging that said opposition was made without his authority, and prayed that the said opposition might be dismissed, and the costs charged to whomsoever instituted the opposition.

On the 16th of April, 1869, before any action had been taken by the court on the said disclaimer and prayer for the dismissal of the opposition filed by said Sauters, the said other creditors, who are his petitioners in this proceeding, filed an application in the District Court, setting forth the agreement between their attorneys and the attorneys of said Sauters, and praying that

their names might be substituted in said specification, by way of amendment, in the stead of the name of said Sauters, to which, on the same day, the bankrupt filed exceptions. On August 6, 1869, said bankrupt filed a motion to dismiss said opposition of Sauters. On the 24th of January, 1870, the District Court decreed that the said other creditors had no right to be made parties to the said opposition and specifications filed in the name of said Sauters, and that all costs accrued since the 16th day of April, 1869, should be paid by petitioners, and that a discharge be granted to said bankrupt.

It is charged that the court erred, first, in holding that the agreement made between the attorneys of Sauters and the attorneys of petitioners was not binding on Sauters, and that he could abandon the same to the prejudice of the rights of petitioners. Second, in holding that said specifications could be dismissed by the action of said Sauters alone, without any action of the court; and, third, in deciding that the court had no authority to hear petitioners in the opposition to the discharge of said bankrupt, in giving judgment against petitioners for costs, and in discharging said bankrupt. In my opinion the whole case turns on the authority held by gentlemen acting as the attorneys of Sauters.

It seems that Sauters had placed his claims in the hands of League & Tucker, attorneys in Galveston, on the 14th of January, 1868. These gentlemen inclosed the claims to Messrs. Robards & Jackson, for collection, inclosing also the deposition to the claims, and requesting Messrs. Robards & Jackson to do with the claims as to them might seem best. In the same month of January, 1868, on what day does not appear, he executes a letter of attorney to Messrs. Robards & Jackson, in pursuance of Form 26, which, it is probable, was transmitted to Robards & Jackson by League & Tucker. Sauters does not appear to have had any connection with Robards & Jackson, on the subject of his claims. It seems very clear that whatever authority Robards & Jackson had in the premises, was based on the letter of attorney. That is the only act of Sauters which gave them any power to act for him; whatever that author-

ized them to do they could do, what was not authorized by it, was done without his authority.

The letter of League & Tucker was no authority binding on Sauters, even if it authorized them to anything more than receive dividends.

We must look, then, to the letter of attorneys to ascertain what powers were conferred by Sauters on Robards & Jackson.

It is obvious that there is nothing in this power of attorney which could authorize the filing of an opposition to, and specifications against, the bankrupt's discharge, unless it is found in the concluding words, to wit: "and with like powers to attend and vote at any other meeting or meetings of creditors, or setting or sittings of the court which may be holden therein, for any of the purposes aforesaid, or for the declaration of dividend, or for any other purpose in my interest whatever."

To hold that these words authorize the filing of an opposition to the bankrupt's discharge appears to be clearly a misconception of the language of the power. The authority granted is to attend and vote at every meeting of the creditors or sittings of the court, which meeting or sitting may be held for any of the purposes aforesaid, or held for the declaration of a dividend, or held for any other purposes in the intent of the creditor signing the power. No authority whatever is here given save only the authority to attend and vote. There are no general words in this power. Throughout the whole instrument there are only three things authorized to be done by the attorneys: first, to attend meetings or sittings; second, to vote at the same; and third, to accept for the signer of the letter of attorneys the appointment of assignee. No other power is granted, no other act is specified to do which authority is given, and there are no general words whatever which will include any other act.

The filing of an opposition to a bankrupt's discharge is a very different thing. It is the commencement of an individual proceeding on the part of the creditor against the bankrupt. It is in fact a suit arising in the course of the bankrupt pro-

ceedings. It involves pleadings, costs, attorney's fees; it may involve a trial by jury. The question of discharge may linger in the court for years, and in every case involve more or less expense and costs. The claim that a power to attend and vote at meetings and accept the appointment of assignee for his principal gives the attorney authority to involve his principal in such a controversy as arises in opposition to the discharge of a bankrupt, is certainly a misconception of the scope and purpose of the power.

I am of opinion, then, that Messrs. Robards & Jackson misapprehended their authority under the letter of attorney; that it did not extend to the making of an opposition to the discharge of the bankrupt, so that the case stands precisely, so far as this question before the court is concerned, as if no power of attorney or other authority had been given to Messrs. Robards & Jackson. They could not then make any opposition to the discharge of Williams on behalf of his creditor, Sauters. They could not use his name for that purpose themselves, and *a fortiori* they could make no contract by which it might be used for the benefit of others. Such a contract was absolutely null and void, being made without authority. The opposition to the discharge was utterly ineffectual, and no rights could spring up under it; and when it was discharged, the result was the same in all respects as if it had never been made.

If Messrs. Robards & Jackson had made opposition in behalf of a party for whom they were not attorneys at all, and after the fact of their want of authority had been brought to the notice of the court the opposition had been dismissed, no effect certainly could be claimed for the opposition. This case is in precisely that predicament, for in the matter of making opposition to discharge they are not the attorneys of Sauters or anybody else.

It is perhaps unnecessary to say that no reflection in any degree is intended on these gentlemen. It was a natural mistake into which they fell, and the court entertains no doubt that everything done by them was done in good faith, and under what they supposed was the authority of Sauters.

These petitioning creditors, then, can derive no advantage from the opposition of Sauters. They are in the same case as if no such opposition had been made. The question then for decision takes this form. Did the court err in refusing permission to file specifications in opposition after the time allowed by the court for filing specifications had passed, and when no opposition had been entered on the day when the creditors were required to show cause? To hold the affirmative of this proposition is to repeal entirely Rule 24, which this court has no power to do. In cases of involuntary bankruptcy, where fraud is the ground on which the petition is based, the courts sometimes look into the record to see whether the bankrupt should have his discharge; but in voluntary cases I know of no instance where the court has overturned Rule 24, and allowed opposition to be made after the day on which creditors are required to show cause has passed, and after the time limited for filing specifications has elapsed. And as the Bankrupt Court has been assimilated to a court of equity, yet even a court of equity must be controlled by its own rules. They are the law which regulates its discretion.

I am of the opinion, then, that the rulings of the District Court were correct. They are therefore affirmed at the cost of petitioner.

The cause being then remanded to the District Court, the following order was passed:

In this cause it appearing from the record that on the 22d day of January, A.D. 1869, upon the consideration of the motion of W. L. Robards, Esq., as attorney for Joseph A. Sauters, creditor of said bankrupt, to dismiss the petition of the bankrupt for a certificate of discharge in bankruptcy, said motion was overruled, and upon the application of said attorney for time to file specifications of opposition to the discharge of said bankrupt, an order was entered by the court extending the time to the said creditor until the 1st day of March, 1869, to file specifications; and the said specifications having been filed on the said 1st day of March, 1869, by attorneys representing themselves as having authority from the said Sauters to file the

same; and the said Sauters having filed on the 5th day of April, 1869, his disclaimer of said opposition and all authority to make the same; and other creditors of said bankrupt having, on the 16th day of April, 1869, appeared and claimed to be substituted in the place of the said Sauters, and this court having allowed them to do so; and on the 24th day of January, 1870, this court having ordered and adjudged that said other creditors could not oppose the discharge of the said bankrupt, not having appeared as required by the law, and not having filed their specifications as required by Rule 24; and the said creditors, having upon petition obtained the supervisory action of the Circuit Judge, Hon. W. B. Wood, presiding at this term of court, and the decision of the Circuit Judge being that the action of the attorneys purporting to represent Sauters was wholly without authority and null, this court, in accordance with the said decision, doth now order that a certificate of discharge do now issue to the said John H. Williams, bankrupt, as of date, January 22d, 1869, in accordance with the law.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

The non-payment of a single piece of commercial paper is not an act of bankruptcy in itself, for the reason that there may be a defense to it; but where such suspension is chronic, or there is an inability to meet and pay checks and notes as they mature, then that is such a suspension as the law contemplates, and even though there may be but a single piece of paper and fourteen days past due, the maker may be adjudged bankrupt.

McLean *et al. v.* Brown, Weber & Co.

This was a petition by creditors to have the defendants adjudged bankrupts, alleging that they had suspended payment of their commercial paper and had not resumed within fourteen days. Upon this suspension issue was taken.

At the trial a check of the defendants given in payment of rent of the store they occupied in their business, and which had remained unpaid for more than fourteen days, was presented in evidence. It was also shown that they had been

embarrassed for some time before the filing of the petition; that they drew checks without funds in bank to meet them, drawing checks upon one bank and depositing them in another so as to gain the time of a day in their passage through the clearing-house, and also drawing kiting bills, upon which they raised money. The bankrupts alleged that they had arranged for the delay of the paper overdue, and that they had not suspended payment; and that they were not insolvent and could have paid their debts as they matured, but for the filing of the petition, which had destroyed their credit and prevented them from fulfilling their obligations.

TREAT, J.—This case differs in its elements from any that have come before me, but the views expressed in previous opinions still remain unmodified. The suspension referred to in the Bankrupt Act is a general suspension of commercial paper, not the mere non-payment of a single note or bill which the debtor refuses to pay because he denies his liability, or does not pay for the reason that he has, as he supposes, arranged for an extension or delay of payment. The court, upon an application of this kind, will not sit to try the validity of the reasons for the non-payment of the note or bill; it is not a court for the mere collection of debts, and each case must be considered by itself in connection with the circumstances surrounding it.

This firm may possibly be solvent and able from its assets to meet all demands if it can get indulgence. It may happen to any man in business to find himself in a condition in which he cannot realize his assets in time to meet his obligations as they mature, and he may need a short indulgence to enable him to collect what is due him; but in this case the difficulty had become chronic, and the firm could not meet their paper in the ordinary course of business, and in that sense they may be considered as being insolvent. It had become a system with them in the course of which checks are drawn and re-drawn, post-dated, laid over; notes met by checks without funds, trusting to funds to be received thereafter. This had become a habit.

They would draw checks and afterwards order their bankers to pay some and throw out others, and then excuse themselves for the return of those dishonored, or try to make some arrangement with the holders thereof for delay. Although, therefore, but a single check is shown to have laid over unpaid for fourteen days, they may be really considered as having suspended payment generally. The non-payment of one piece of paper is not of itself a suspension, for there may be good reason for it; the party may have had a defense against it, or he may have arranged for delay of payment; but when he fails to pay for want of means, and continues unable to pay, he has suspended within the meaning of the act, and may be adjudged bankrupt. Let the judgment be entered for the creditor.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

A voluntary conveyance, settling property upon the wife and family of the grantor, will be considered fraudulent as to subsequent creditors, if the grantor be indebted at the time to such an extent that the settlement will embarrass him in the payment of his debts, although the debts due may be subsequently paid in the course of business.

ANTRIM, *Assignee, v.* KELLY *et al.*

THIS was a bill filed by the assignee of Antrim, Sweet & Co., against Kelly, as trustee, and the wife and children of the bankrupt, to set aside a voluntary settlement made by the bankrupt Antrim on the 15th of May, 1867, as fraudulent as against creditors. At that date Antrim & Sweet were in business, Antrim being possessed of a large amount of real estate, part of which was incumbered by deeds of trust made to raise money with which to carry on the business. The firm had previously procured a division and extension of part of their commercial paper for sixty and ninety days, which was met at maturity, and the firm continued their business for a year, meeting all their debts as they matured, and then suspended payment and filed their petition in bankruptcy July 28, 1868. At the

date of the settlement, Antrim was possessed of real estate of the estimated value of sixty thousand dollars; the value of the property settled was twenty thousand dollars. The incumbrances were eighteen thousand dollars. The defendants alleged that the settlement was made in accordance with a promise made at the date of the purchase of the property by Antrim, and before he went into business, and that he was abundantly solvent at the time of the conveyance. By the statutes of Missouri a voluntary conveyance duly recorded, is valid as against subsequent purchasers and creditors, unless made with intent to defraud creditors.

The court held that the bankrupt was indebted at the time of the conveyance, and that although the debts then due were paid in the course of business, yet they were paid by contracting other obligations, and finally resulted in the insolvency of the firm—that the settlement upon his family took away a large proportion of assets which should be applied to the claims of creditors and set aside the deed.

UNITED STATES DISTRICT COURT—KANSAS.

A merchant doing business and residing in Kansas is not entitled to the special exemption allowed mechanics, miners, or other persons for the purpose of carrying on their trade or business. Such exemption made by an assignee in bankruptcy will be disallowed.

In re Schwartz.

Statement of Facts.

It is admitted and agreed that at the time of the filing of the petition in bankruptcy, M. F. Schwartz, the bankrupt, was a citizen of the State of Kansas, and was and had been domiciled in Kansas for more than one year previous thereto. That he was the head of a family. That he was a retail merchant of dry goods, clothing, hats, caps, boots, and shoes in Wyandotte, Wyandotte county, in said State. That the amount of merchandise, consisting of miscellaneous articles, was selected and

set apart by the assignee to the bankrupt from his stock, under and by virtue of the provisions of the eighth subdivision of Section 11, pages 549 and 550, Compiled Laws of Kansas of 1862, and only by virtue of said provisions, and does not exceed four hundred dollars, as appears by the bill and appraisal or report on file herein. That the report of the assignee of the articles set off to the bankrupt by him was made to the court within twenty days after receiving the deed of assignment, with the estimate value of each article.

John K. Hale, attorney for assignee.

Clough & Wheat, solicitors for Henry Bell & Son.

At Leavenworth, in said district, on the 29th day of March, 1871:

The undersigned, to whom the matter of the exceptions to the statement of the assignee of the said M. F. Schwartz set apart by him to the bankrupt, as property excepted from the operation of the Bankrupt Act, to report to the court the facts and the conclusions of law thereon, reports:

That he sat at his office in Leavenworth on the 27th day of March, 1871, to hear the matter aforesaid. When Mr. Clough appeared in behalf of the excepting creditors, and W. Hale in behalf of the assignee.

The parties submitted an agreed statement of the facts, which is hereto attached and made part of this report.

From this statement of facts it appears that the bankrupt at the time of the filing of the petition in bankruptcy, was a retail merchant, and the property set apart and assigned to him was goods and merchandise, a part of his stock of goods, which up to that time he had been engaged in selling in Wyandotte, in the State of Kansas. This property was set apart to the bankrupt as "stock in trade," and was so set apart under the provisions of the eighth subdivision of Section 11 of the exemption statute of the State of Kansas, Compiled Laws, 1862.

The question, therefore, is fairly raised, whether under the exemption laws of the State in force in the year 1864, and they are the same now, a *merchant*, in addition to the specific exemp-

tions prescribed by those laws, was entitled to have exempted from execution, etc., stock in trade not exceeding four hundred dollars in value.

I am not aware that this provision of the Statute of the State of Kansas has ever received a construction from the Supreme Court of the State, but it has been decided by the District Court of the County of Leavenworth that merchants are not of the class of persons specified in the eighth clause of the statute.

The District Court, in so deciding, has followed the decision of the Supreme Court of the State of Minnesota on this precise point, made by it in the case of *Grimes* v. *Bryne*, reported in Vol. II. of the Reports of that State, page 89.

That decision was made in December, 1858.

The clause in question in the Kansas statute is literally copied from the Minnesota statute.

Hence that clause had received a construction in the highest court of the State in whose statutes the provision is first found before its incorporation into the laws of this State.

And the Legislature of this State is supposed to have made that provision a part of our statute with a knowledge of the construction given to it in its native State, and to have also adopted that construction of the act.

But were this an open question, now first presented, I should put the same construction upon the statute. I think it the correct one, and one in harmony with the spirit of the act.

In opposition to this view, it is objected that the Legislature of Kansas has given a construction to the words "stock in trade," and that by legislative enactment they are to be "construed to mean the same as the words goods and chattels."

The Legislature did, by an act amendatory of the act to establish a code of civil procedure, on February 25, 1860, declare, that whenever the words should occur *in that act* in the Code of Civil Procedure, they should be construed to mean the same as the words goods and chattels. I think that cannot be held to be an authoritative interpretation of those words when used in another statute, enacted at another time, and having reference wholly to another subject-matter.

But if wrong in this, if these words, "stock in trade," should be held to mean "goods and chattels," the objection made to the claim of the assignee, that these goods were rightfully set apart to the bankrupt, is not removed.

The provision would then be, that the class of persons in that clause specified should have set off to them, exempt from seizure on execution, etc., *goods* and chattels not exceeding four hundred dollars in value. But the question, who are the persons composing this class, and are therefore entitled to this exemption? is still to be met and answered.

If language is to be used in its ordinary sense and have any force and meaning, the persons meant are they who "keep and use tools and instruments" (*implements probably being intended*) "for the purpose of carrying on their trade or business." Hence, as was held in the case before cited, *Grimes* v. *Bryne*, the clause should be construed as though it read thus:

The tools and instruments (implements) of every mechanic, miner, or other person *to the exercise of whose trade or business tools and implements* are necessary, used and kept for the purpose of carrying on his trade or business, etc.

If this is a correct construction of the act, as I think it clearly is, then, among the persons intended to be provided for by the provision of the statute in question, there is no place for a merchant.

The only exemptions to which he is entitled are those provided for in other sections, concerning which nothing more can be here said.

Hence I report to the court, as a conclusion of law from the agreed statement of facts, that the setting apart of the goods in question to the bankrupt, as excepted from the operation of the Bankrupt Act, was improperly done, and that the same should be inventoried by the assignee as a part of the estate of the said bankrupt.

Respectfully submitted,

HIRAM GRISWOLD,

Register.

In re Schwarts.

DELAHAY, J.—The Register in Bankruptcy of this court, to whom the matter of the exceptions to the certificate of exempted property, filed by the assignee, was referred, having made his report to the court, said report is approved.

And the court being of the opinion that the goods and merchandise mentioned in said certificate of exempted property, valued at three hundred and ninety-nine dollars and ninety-nine cents, described on pages 4, 5, 6, and 7 of said certificate, set apart by the assignee to be retained by the bankrupt, as excepted from the operation of the Bankrupt Act, are not, by the provisions of said act, exempted from levy and sale upon execution or other process or order of any court by the exemption laws of the State of Kansas, in force in the year 1864, and are not, by the provisions of said act, exempted from the operation thereof, and should not have been so set apart to be retained by said bankrupt, it is

Ordered, that said certificate of exempted property be amended and corrected by striking from the same all the property described on pages 4, 5, 6, and 7 thereof, and that said assignee inventory and administer upon the same as other property belonging to said estate.

To which decision of the court the said assignee excepts.

(Below we give an extract from the exempt laws referred to in the preceding decision:)

Compiled Laws of Kansas, 1862, *page* 549, *Section* 11.

"No property hereinafter mentioned or represented, shall be liable to attachment, executiont or sale on any final process issued from any court in this territory. *First.* The family bible. *Second.* Family pictures, school-books, or library, and musical instruments for use of family. *Third.* A seat or pew in any house or place of public worship. *Fourth.* A lot in any burial ground. *Fifth.* All wearing apparel of the debtor and his family, all beds, bedsteads, and bedding, kept and used by the debtor and his family, all stoves and appendages put up or kept for the use of the debtor and his family, all cooking utensils, and all other household furniture not hereinafter men-

tioned, not exceeding five hundred dollars. *Sixth.* Three cows, ten swine, one yoke of oxen and one horse, or, in lieu of one yoke of oxen and one horse, a span of horses or mules, twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth, the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also, one wagon, cart, or dray, one sleigh, two ploughs, one dray, and other farming utensils, including tackle for teams, not exceeding three hundred dollars in value. *Seventh.* The provisions for the debtor and his family, necessary for one year's support, either provided or growing, or both, and fuel necessary for one year. *Eighth.* The tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding three hundred dollars in value, and, in addition thereto, *stock in trade not exceeding four hundred dollars in value;* the library and implements of any professional man; all of which articles, hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, clerk, or legal representative, as the case may be."

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Until a recovery has been had, by judgment or decree, a preferred creditor may surrender under Section 23; and his right to make probate of his debt and share in the distribution of bankrupt's estate will not be affected by suit commenced and pending against him at the time of such surrender.

In re KIPP.

THE facts are set forth in the following agreement of counsel:

It is hereby stipulated and agreed, by and between William Jennison, attorney for John N. McDonald, survivor, etc., and Cleveland Hunt, attorney for William F. Linn, assignee of said Joseph S. Kipp, that the following facts are admitted to be true in this cause:

That said Joseph S. Kipp was, on or before the 4th day of

May, A. D. 1869, a merchant, doing business in Bay City, Michigan, and was indebted to several creditors, amongst whom was the firm of McDonald & McDowell, merchants in said Bay City, and of which firm said McDonald was a partner; and that the debt of said firm against said Kipp was nine hundred and eighty-eight dollars and fifty-three cents.

That said Kipp confessed judgment in the Circuit Court for the county of Bay, Michigan, for the sum of nine hundred and eighty-eight dollars and fifty-three cents, in favor of said McDonald & McDowell, on the 4th day of May, A. D. 1869.

That an execution issued upon said judgment on the 6th day of May, 1869, and upon which day the sheriff of said county levied upon the stock of goods of said Kipp, and proceeded to advertise the same.

That on the 11th day of said May, and before said goods were sold under said execution, said Kipp sold said stock of goods to said McDonald, etc., in full payment of said judgment, and which, with the cost of said proceedings, was the fair value of said goods.

That the petition in bankruptcy in this case was filed by a creditor of said Kipp, May 22d, 1869; and that said Kipp was adjudged a bankrupt on the 18th day of September, 1869.

That on the 4th day of February, 1870, William F. Linn, the assignee of said bankrupt, commenced proceedings against said McDonald, as survivor of himself and said McDowell, also deceased, in 1869, by filing a petition in said court to recover the value of said goods.

That on the 4th day of April, 1870, and before any proceedings other than the filing of said petition was had to recover the said property so sold as aforesaid by said Kipp, the said McDonald, as survivor of himself and said McDowell, surrendered to said assignee the value of said goods by paying the sum in money to him, together with the cost of proceedings, and took from him his receipt in full thereof, as per Exhibit "A" annexed.

That at the time of the sale of said goods, to wit, the 11th day of May, 1869, the said Kipp was insolvent; and said Mc-

Donald & Co. had reasonable cause to believe that he was so insolvent.

(Signed) CLEVELAND HUNT,
Attorney for Assignee.
WM. JENNISON,
Attorney for McDonald.

EXHIBIT "A."

In the matter of JOSEPH S. KIPP, *bankrupt:*

Received of William Jennison, Esq., attorney of John McDonald, and Charles M. Averill, executor of McDowell, one thousand one hundred and sixteen dollars and ninety-seven cents, ($1,116.97), amount in full of claim against them as preferred creditors of Kipp, being value of goods received by McDonald and McDowell, in May, 1869, in Bay City, of said Kipp; said Jennison is to pay marshal's and clerk's costs.

(Signed) W. F. LINN, *Assignee.*

LONGYEAR, J.—Deeming the question raised by the issue above certified of sufficient importance, I ordered the same to be argued before me on the 28th day of February, 1871; and the same was accordingly argued by Mr. Cleveland Hunt, for the assignee, and Mr. William Jennison, for John N. McDonald, survivor, etc.

The distinct issue or question of law arising in this case is not stated with such clearness and certainty as could be desired; but the facts clearly appear, and from them I infer, and find my inferences confirmed by the statements of counsel on the argument, that the specific grounds of opposition to McDonald's claims are,

First. That the case falls under the second clause of Section 23 of the Bankrupt Act, and that McDonald's surrender to the assignee of all property, etc., received by him under his preference, not having been made until after suit brought against him by the assignee for the recovery of such property, is not such a surrender as is contemplated by Section 23.

Second. That the proof of the claim is absolutely barred by the last clause of Section 39 of the Bankrupt Act.

It does not appear in the record whether or not there was a demand and refusal before the assignee brought his suit.

It was claimed, however, on the argument, and conceded, I believe, that there was such demand and refusal. But in the view I take of the law, I do not consider it material whether there was such demand and refusal or not.

It has been already decided by this court:

First. That the operation of the second clause of Section 23 is, in the first instance, merely to suspend the right of a preferred creditor to prove his claim until he shall first have surrendered; to ripen, however, into absolute prohibition if said surrender shall not be made.

Second. That such surrender cannot be made after a recovery has been had under Sections 35 and 39.

Third. That the absolute prohibition contained in the last clause of Section 39 applies only after such recovery.

Fourth. That the recovery provided for in Sections 35 and 39, when considered in relation to the surrender provided for in Section 23, means a recovery in its strict legal sense, viz.: by judgment or decree. *Scott* v. *McCarty*, 4 N. B. R., 414, 418; *Tonkin & Trewartha*, 4 N. B. R., 52.

Under the above rulings, and to which I fully adhere, it inevitably follows, that until a recovery has been had, as above defined, that is, by judgment or decree, a preferred creditor may surrender under Section 23, and his right to prove his debt against the bankrupt's estate, and to receive dividends therefrom, will by such surrender be revived, and become binding on all concerned, regardless of the question whether a suit shall or shall not have been commenced against him by the assignee, and be pending at the time of such surrender.

Whether, in case of an offer to surrender after a trial shall have been commenced in such a suit, the matter would not be so far under the control of the court that it could not and would not direct a judgment to be entered, notwithstanding such offer, is a question not involved in this consideration, and is therefore not now decided.

The able arguments of counsel for the assignee against the policy of allowing preferred creditors to prove their debts, after having refused to surrender on demand, and put the assignee to the trouble, delay, and expense of bringing suit, may be, and probably are, good and sound in favor of an alteration of the law, so as to fix some definite time within which preferred creditors shall surrender after demand. But the law must be administered as it is; and so administering it in this instance, I must hold that the debt of the said John N. McDonald, survivor, etc., as certified to me by the Register, is provable against the estate of the said bankrupt.

UNITED STATES DISTRICT COURT—E. D. PENNSYLVANIA.

A decree annulling a voluntary assignment by a debtor of all his estate in trust for the equal benefit of all his creditors, made within six months before the commencement of proceedings under which he was adjudged a bankrupt, should contain a direction for a conveyance by the voluntary assignee, surrendering the estate to the assignee in bankruptcy.

The accounting by the voluntary assignee should be, under the decree, to the assignee in bankruptcy. There should be no subsequent account in a proceeding under State legislation in a court of the State, unless some extraordinary reason requires a distribution under the laws of the State for the benefit of the general body of the creditors.

A mere general allowance in the decree of the reasonable charges and expenses of the voluntary assignee, should not be understood as including his expenses of a proposed account in a State court.

BURKHOLDER *et al. v.* STUMP.

THE defendant was the trustee under an assignment made within six months before the commencement of the proceedings in bankruptcy, by the bankrupt, of all his estate, for the equal benefit of his creditors. The suit was under the auxiliary summary jurisdiction, by a petition containing informally the essential averments which would have been required in a bill in equity to set aside the assignment; and prayed a citation. The defendant appeared forthwith without any citation having been issued, and filed an answer. Upon the petition and answer, the case was heard at the weekly session for cases in bank-

ruptcy, and a decree made for the petitioner. It set aside the assignment, ordering the defendant to surrender the estate to the petitioner, and account to him, with an allowance to the defendant of his necessary and reasonable charges and expenses. In settling the form of the decree, two questions arose.

The first was, whether the decree should contain a direction for a conveyance to the petitioner by the defendant. The court said that such a direction was proper and usual; that although the decree annulled the assignment, and ordered a surrender of the estate, yet the conveyance by a deed of surrender might effectuate or facilitate purposes of such a decree. The petitioner might or might not see occasion to enforce this part of the decree. If he desired its enforcement, he might cause the deed of surrender to be prepared in a succinct form, reciting the decree; and should the parties disagree as to the form of the conveyance, the Register might settle it.

The second question was, whether the allowance of the expenses and charges of the defendant should include any reservation of the expense of a future settlement of the defendant's account in a court of the State, under her laws relating to such assignments.

To this Mr. Duffield, for the petitioner, objected.

Mr. Bispham, contra, urged that the defendant was liable to be cited to account in the State court, and might thus be involved in charges which he ought not to incur, as no fraud was imputable to him, and as he had, so far as was proper, submitted himself to the present jurisdiction.

The court said: The defendant, if so cited in a court of the State, could, in bar of the proceeding, show that the whole estate had been compulsorily taken away from him by the decree of this court, under whose jurisdiction he was accountable, and had accounted, etc. If this court's decree recognized a continuing accountability elsewhere, the consequence might be to delay the proceedings in bankruptcy. Unless there were, as may possibly have occurred in some peculiar cases, extraordinary occasion for permitting distribution under the laws of the State,

it ought not to be sanctioned. It can only be permitted where it might promote the interests of the general body of the creditors. This might be the case in consequence of something intervening between the voluntary assignment and the commencement of the proceedings in bankruptcy, such as an intervening judgment or execution, though it might, perhaps, even then be preferable in most cases, to protect the general equities by injunction, and work them out in bankruptcy, or under the auxiliary equitable jurisdiction.

Every person receiving one of these assignments ought to know that the assignment is liable to be set aside if the bankruptcy follows; and the allowance to him of his charges and expenses ought to be refused where it cannot be so guarded as to prevent any injurious duplication of charges. In some of the judicial districts of the United States, the allowance is refused wholly, and occasional precedents of contrary directions here, will not be followed, if to follow them would result in any injustice to creditors.

J. Davis Duffield, Esq., for plaintiff.

Geo. T. Bispham, Esq., for defendant.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A bankrupt having objected to an examination before a Register in Bankruptcy upon the following grounds:

That the Register has no authority to grant an order for the examination of a bankrupt, either by statute or rule.

That the order, if granted, as it recites on application, should have been on a verified application in writing.

That the order is on its face defective, in that it does not purport to be "on the application of a creditor who has proved his claim."

Held, that the examination is correct. Third objection is frivolous.

In re VETTERLEIN.

AT New York, in said district, on the 23d day of February, A. D. 1871.

I, Henry Wilder Allen, one of the Registers of said Court in

Bankruptcy, do hereby certify, that in the course of the proceedings in said matter before me, the following questions arose pertinent to the said proceedings, and were stated and agreed to by the counsel for the opposing parties, to wit: Mr. Ward, who appeared for the bankrupts, and Mr. Hill, who appeared for Fatman & Co., creditors of the said bankrupts. The bankrupt, Bernhard T. Vetterlein, appeared, but through his counsel, Mr. Ward, objected to being examined under the accompanying order for the reasons following:

First. That the Register has no authority to grant an order for the examination of a bankrupt, either by statute or rule.

Second. That the order, if granted, as it recites on application, should have been on a verified application in writing.

Third. That the order is on its face defective, in that it does not purport to be "on the application of a creditor who has proved his claim."

And the said parties requested that the same should be certified to the judge for his opinion thereon.

The Register is of opinion that the order for examination referred to is correct in form and properly issued.

The second objection to the order is disposed of in the case of Solis, 4 N. B. R., 68.

The third objection has no force because the order recites that the parties upon whose application it was issued have duly proved their debt.

HENRY WILDER ALLEN, *Register.*

BLATCHFORD, J.—The Register is correct in his views. As to the first objection, see *In re* Brandt, 2 N. B. R., 215, 345. As to the second objection, see *In re* Solis, 4 *Id.*, 68. The third objection is frivolous.

UNITED STATES CIRCUIT COURT—MISSOURI.

The Bankrupt Act does not prohibit a person from loaning money at legal rates to one whom he has reason to believe to be insolvent, and taking security for such loan, provided it be made *bona fide* and without any

intent, or participation in any intent, to defraud creditors or defeat the Bankrupt Act.

Advances made in good faith to an indebted person, to enable him to carry on his business, upon security taken at the time, do not violate either the terms or policy of the Bankrupt Act, since the debtor gets a present equivalent for the new debt he creates and the security he gives.

When the charter of a bank prohibited it from taking a greater than a specified rate of interest, but was silent as to the effect or penalty if more than the charter rate be taken, it was held that if an illegal rate be contracted for, the effect was not to render the whole note void, but only the excess beyond the legal rate, and that at all events, if such a note be voluntarily paid, neither the borrower or his assignee in bankruptcy can recover back the principal sum, or anything more than the *excess* beyond the legal rate of interest.

Equity will entertain a bill to recover such excess; the remedy is not exclusively at law.

Darby's Trustees *v.* Boatman's Saving Institution.

Present, Dillon, Treat, and Krekel, J. J.

The complainants are trustees, under the 43d Section of the Bankrupt Act, of John F. Darby, who was decreed a bankrupt on the 2d day of July, 1869.

After stating that Darby was decreed a bankrupt, and Park and Tiffany appointed his trustees, the bill avers that Darby had for a long time prior to October, 1868, been doing an unprofitable business as private banker, which defendants well knew. That being largely indebted, he had been in the constant habit of making and issuing his promissory and negotiable notes in sums of from two thousand to five thousand dollars, bearing interest on their face; that they were constantly placed in the hands of street brokers and sold or shaved at a heavy discount thereon for a commission paid by Darby, which defendants knew. That Darby's real estate was all fully incumbered and the incumbrances recorded, and of which defendants had notice. That on or about the 14th of October, 1868, defendants, knowing that Darby was acting in contemplation of *insolvency*, and that his course of business must inevitably render him bankrupt, conspiring together for their own benefit, and intending to enrich themselves at the expense of Darby and his creditors, and conspiring with Darby himself to "gain and maintain for him an unreal, false, and fictitious credit," and in fraud of his creditors, and designing, etc., to defeat the

Bankrupt Law, did, being limited by its charter to eight per cent., agree to lend, and did lend to said Darby one hundred and twenty-eight thousand one hundred and thirty-seven dollars and fifty cents, and receive therefor his note for one hundred and thirty-five thousand dollars, dated 14th of October, 1868, bearing ten per cent. interest after maturity, and payable six months after date; on the face of this note was written, "One hundred and fifty seven per cent. jail bonds, one thousand dollars each, as collateral to this note, are deposited in the Bank of America, New York," and on the back of it were certain memoranda of payments beginning 5th of March, 1869, and ending June 2d, 1869, extinguishing the note and ten per cent. That the note was utterly void and fraudulent. When it became due defendants fraudulently extended it; knowing, etc., that they allowed him to sell and dispose of the said bonds within four months of his bankruptcy; knowing, etc., and received the proceeds thereof from him in payment of said note.

That the defendant, well knowing, etc., refused to discount certain other notes of Darby, indorsed by responsible persons, did purchase from street brokers the following, viz.: Two notes, each indorsed by Marshall Brotherton, dated 21st of September, 1868, at five and six months respectively, each for five thousand dollars; three notes dated about 3d, 6th, and 27th of November, 1868, payable three months, sixty days, and six months after date, for five thousand dollars each, indorsed by S. Knox. Defendants knew that these notes were indorsed for the mere accommodation of Darby, and sold by note brokers at usurious and illegal rates, as high as from twelve to fifteen per cent., and contrary to their charter. That all such notes were void. That afterwards, having reasonable cause to believe Darby to be acting in contemplation of bankruptcy, received the amount of said notes at maturity from said Darby. Defendants also bought another note, dated 6th of February, 1869, at sixty days, for five thousand dollars, indorsed by Brotherton, and received the amount at maturity. Plaintiffs charge that defendant had reasonable cause to believe at the time of the negotiation of said notes that Darby was in-

solvent and acting in contemplation of insolvency; that the course and tendency of his business must lead to ruin; that the mode of selling his paper was not the usual one; that all his real estate was largely encumbered. That notes taken from Darby were void *ab initio*. That for the purpose of acquiring a fictitious credit Darby bid for the jail bonds of St. Louis county more than their market value; that at the time he had no funds, etc., and applied to the National Bank of the State of Missouri to loan him the money; the bank lent him the money. Darby lost large sums by the purchase, and was indebted therefor to the bank, and being unable to pay, applied to defendants to lend him one hundred and twenty-eight thousand one hundred and thirty-seven dollars and fifty cents, and to discount his note for one hundred and thirty-five thousand dollars, to enable him to discharge, in part, at least, his said indebtedness to the bank, and not for the purpose of his ordinary and legitimate business; all of which defendants well knew, and conspired with Darby to maintain for him his said fictitious credit, and to defeat the provisions of said act, and discounted the said note in furtherance of said plan. Said bonds had never been in Darby's possession, but had been delivered to the bank; purchasing them had been noised about in the public prints, with the intent, etc., but had been bought by said Darby and paid for by said National Bank. That they "never were in good faith absolutely delivered to defendant, but that defendant, upon the delivery of the bonds, made an arrangement with Darby that he might at any time sell the same, and dispose thereof before or after the maturity of the note for one hundred and thirty-five thousand dollars, applying proceeds to the payment of the note; permitted Darby to deal with the bonds and coupons as his own property, and not as held and pledged to defendants; and allowed him to be considered as the absolute owner, thereby giving him a false and fictitious credit, "necessarily productive of loss to Darby and his creditors," in fraud of the Bankrupt Act. All of which was done to prevent the property of Darby from being distributed under the Bankrupt Law. Wherefore plaintiff "ought

in equity and in accordance with the terms of said act, to recover of said defendants all the said sums of money to them paid by the said Darby in fraud of said act and in payment of said fraudulent and void notes," and the prayer is for a decree to that end.

A general demurrer to the bill is filed, on which the questions decided arise.

Glover & Shepley and *Samuel Knox*, for complainants.

Thos. T. Gantt, Lackland, Martin & Lackland, for defendants.

DILLON, C. J.—This is a bill in equity by the trustees in bankruptcy of John F. Darby, to recover from the defendants the sum of one hundred and sixty-five thousand dollars, to which, for the reasons as stated in the bill, the trustees claim to be entitled.

The facts set forth in the bill are numerous, and several transactions are detailed. The questions presented may be best treated by first stating some principles of law which underlie this controversy, and then by applying these principles to the case made by the bill.

There is no provision of the Bankrupt Law which prohibits a person from loaning money to or discounting, at *legal* rates, the notes of a person whom he has reason to believe to be insolvent, provided the former makes such a loan or discount *bona fide*, and without any intent, or participation in any intent or scheme to defraud creditors or defeat the Bankrupt Act. As such loans may be lawfully made, so security therefor may be lawfully taken. The distinction is here: the act, under the circumstances stated in the bill, does prohibit a debtor from giving, or a creditor receiving, security for a *pre-existing* debt, thereby obtaining a preference which it is one of the chief purposes of the law to prevent. So the Bankrupt Act prohibits an insolvent person from making any conveyance or disposition of his property to those not creditors, which shall work a fraud upon creditors and upon the act. (Sections 14, 35, 39; *Bean* v. *Brockmire*, 4 N. B. R., 196 at last term.) The cardinal idea is,

that all the property of a person in Darby's situation ought to be appropriated for the equal and indiscriminating benefit of all his creditors; and therefore he can neither fraudulently diminish the amount of his assets, nor give one creditor, or class, a preference over others, since such preferences are stamped, by the inexorable policy of the enactment, as void.

But a person insolvent may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money, and give, at the time, security therefor, provided, always, the transactions be free from fraud in fact, and upon the Bankrupt Act. And hence it is a settled principle of Bankrupt Law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the Bankrupt Act. This is manifestly right, since the power to raise ready money may save the party from bankruptcy and ruin, and since his creditors are not injured nor his estate impaired because he gets a present equivalent for the debt he creates and the new security he gives.

To this effect are all the authorities. Deacon, Bankr., 68, 69, 75, and cases cited; Shelf, Bankr., 146; Hilliard, Bankr., C. 10, p. 333, Section 16; Hutton & Crutwell, 1 El. & Bl., 15; *Harris* v. *Rickett*, 4 Hurl & N., 1; *Bruteston* v. *Cooke*, 6 E. & B., 296: *Lee* v. *Hart*, 34 Eng. Law & Eq., 569; *ex parte* Shouse, Crabbe's R., 482; *Bell* v. *Simpson*, 2 H. & N., 410; *Hunt* v. *Mortimer*, 10 B. & C., 44; *Wadsworth* v. *Tyler*, 2 N. B. R., 316; Bankrupt Act, Section 14, second proviso; *Id.*, Section 20; *In re* Wynne, 4 N. B. R. 23.

If, therefore, the advances made under the circumstances set forth by the defendants to Darby contemporaneously with the receiving of the securities, had been at legal or authorized rates, they would have been valid; and the transaction not being forbidden by the Bankrupt Act, the security received could be enforced by law, and, if so, then Darby could lawfully pay such advances out of the proceeds of the securities which he had pledged. What the law will com-

pel one to do, may be legally done by him without such compulsion.

This bill does not charge that the money was borrowed by Darby fraudulently, to put it beyond the reach of creditors, but to enable him to pay a debt to the National Bank of the State of Missouri, from which he had originally borrowed the money to pay for the jail bonds, and which then had them in pledge; and there is nothing shown to invalidate the debt or security to the National Bank, and the effect of the loan made by the defendants was simply to substitute them in the place of that bank, and did not work any fraud upon the creditors of Darby.

The intent to defeat the Bankrupt Act charged in the bill is based upon the assumption that the loans and advances to Darby are void because made at illegal rates, and not upon the ground that Darby intended to conceal his property or to prefer or otherwise defraud his creditors. Having thus settled that if the loan had been at authorized rates, it would not under the facts charged have been in violation of the Bankrupt Act, we next proceed to inquire into the effect of receiving and taking interest in excess of such rates.

The complainant's fundamental proposition is, that although the defendant actually paid Darby one hundred and twenty-eight thousand one hundred and thirty-seven dollars and fifty cents in cash for the note of one hundred and thirty-five thousand dollars, secured by a concurrent pledge of the jail bonds as collateral, yet, since the loan was made at more than eight per cent., the transaction was, to use the clear language of the complainant's counsel, "without any authority in the charter, was *ultra vires* and void, created no debt in favor of the defendants, imposed no legal liability on Mr. Darby, and hence no payments could be legally made upon it; if made, were without consideration, and in fraud of the right of creditors."

The charter of the defendant, granted by the State of Missouri, contains this provision:

"The said institution shall be authorized to loan the money deposited with her at any rate of interest not exceeding eight

per cent. per annum, any law to the contrary notwithstanding." (Section 14.)

The charter is silent respecting the effect or penalty if more than the prescribed rate of interest be taken.

By the general usury laws of the State money may be loaned at a rate not exceeding ten per cent., but if the law is violated the contract is not wholly void, but the plaintiff can only recover for himself the principal sum; but the defendant is also compelled to pay legal interest for the use of the school fund; and usurious interest voluntarily paid is not under this statute recoverable back by the borrower from the usurer. *Ransom* v. *Hays*, 39 Mo., 445.

The complainants' counsel disclaim all rights grounded upon the general usury laws, since the bill is not, as they say, intended to enforce them, and is not one to recover back money. They plant themselves wholly upon the provision in the charter above mentioned, restricting the defendants to interest not exceeding the specified rate; and the argument is, as above stated, that if this provision be violated the loan is *ultra vires* and void. The rate of some of the loans set out in the bill exceeded not only eight but ten per cent., and the question is, what is the effect of this violation of the law?

In our opinion the defendant, if more than ten per cent. interest be taken, is within the operation of the usury laws of the State, if the debtor choose to plead it. Rev. St., 1865, 83, Section 4; and see *State*, etc., v. *Boat. Sav. Inst.*, *quo warranto* case, M. S. If so, the effect is that under those laws it would lose its right to recover any but the principal sum; but the debt having been paid, the usurious interest could not have been received back to Darby had he not been put in bankruptcy; nor can it in this State be recovered by his assignees, much less could he or they recover back the principal sum. *Ransom* v. *Hays*, 39 Mo., 445.

But suppose that the charter *alone* applies to the transaction, what is the effect upon it? The charter itself is silent on this subject. Upon the best consideration we have been able to give to the matter, our conclusion is, that the effect of taking

more than the specified rate of interest on loans is not to avoid the whole note—to nullify the transaction—to forfeit the entire debt or sum loaned, but only the excess over the charter limit, so that the note, as to the principal sum at least, if not the principal sum and eight per cent. interest, was valid, the security taken therefor valid, and so could be enforced, and the bonds sold against Mr. Darby's will, and hence could be lawfully sold by him, with defendant's consent, and the proceeds paid on the debt they were pledged to secure.

This is a case where the line which separates that which is authorized from that which is prohibited, is plainly drawn, and the division easily made, and hence there is no necessity, in order to enforce the prohibition or to secure its policy, to sacrifice the good that the bad may be destroyed.

In contracts usurious under the State law, the same division is constantly made; the plaintiff recovers that which is not prohibited, and loses his right to that which is.

If we look at the legislative history of banking and similar corporations in the State, we find no such severe policy declared as that if more than a given rate of interest be taken, the whole sum loaned shall be forfeited, but quite the contrary.

The power of the defendant to make loans is expressly conferred, and therefore exists; the limitation is only as to the rate. Up to the limitation all is good; beyond that, bad.

And such is the general, though not quite uniform doctrine of the authorities: *Harris* v. *Runnells*, 12 How., 78; *Bank of United States* v. *Fleckner*, 8 Wheat., 338; to which the court "deliberately adhered" in the *Bank of the United States* v. *Waggoner et als.*, 9 Pet., 378; *Farmers' Bank* v. *Burchard*, 35 Verm., 346, and cases cited; *Bank* v. *Nolan*, 7 How. (Miss.), 508; *Rock River Bank* v. *Sherwood*, 10 Wis., 220; *ex parte* Moore, 1 B. R., 123; *Lyon* v. *State Bank*, 1 Stein, Ala., 468; *Bank* v. *Archer*, 8 Sm. & M., 151; *McLean* v. *Lafayette Bank*, 3 McLean, C. C. Rep., 587, 598, 609, 614. This last case contains a highly interesting discussion of the subject by Judge McLean, whose views have our approval. Before leaving this point, it should be observed that we have not overlooked the

case of the *Bank of the United States* v. *Owens*, 2 Pet., 557, but upon the examination of the other cases referred to in the same court, it is quite clear that its doctrine is modified; but if not, it has no rightful application to a case where, as in the one now under consideration, the illegal contract is not, as in that case, sought to be enforced; but where, having been performed, the money voluntarily paid under it is sought to be recovered back.

If, as shown above, the loan was not a fraud in fact or upon the Bankrupt Law, Darby's trustees have no more right to recover back the money which Darby voluntarily paid, because paid in violation of the charter, than Darby himself would have had if he were not in bankruptcy.

Suppose, for the argument, however, that the note was void because the charter rate was exceeded, does it then follow that the bill to recover back the whole sum received will be? This bill is in equity, and the rule is well settled, that under statutes which declared contracts affected with usury utterly null and void, equity would only relieve against them on condition that the borrower will tender or pay the sum actually lent and lawful interest; and if paid, neither at law nor in equity could he recover back anything more than the excess beyond principal and lawful interest, unless the action be expressly given. 1 Story, Eq., Sections 301, 302; *Spain* v. *Hamilton's Administrator*, 1 Wallace, 604.

The analogy is good here, and Mr. Darby having received the defendant's money and paid it, there is no equity whatever to recover back any part of it, except the excess beyond the principal and the eight per cent. interest. In equity, if not at law, there was a debt for the amount borrowed and a right to the security of the bonds pledged. The debt was paid out of the securities, and if the pledging of the securities was valid, as we have seen it was, the defendant had the right to make its debt out of the securities, notwithstanding its officers knew when they received payment that Darby was insolvent. So that the question of the defendant's liability turns upon the point first discussed, to wit, whether the Bankrupt Act was violated by the loans to Darby, and the taking of the securities

from him by the defendant under the circumstances set forth in the bill, and that question we have felt constrained to resolve against the complainants.

Counsel concede that the other transactions mentioned in the bill involve the same principles, and it is unnecessary to notice them specially.

In view of the charter restriction and its policy, the parties were not *in pari delicto*, and as to the excess above the principal and eight per cent. interest, we think, under the facts charged in the bill, there is liability, at least to some extent, on the part of the defendant; and the authorities show that relief may, in proper cases, be had in equity, and that the remedy is not exclusively at law. Indeed, the original remedy in such cases was given in equity. Fonbl. Eq., Book 1, C. 4, Section 7; Story, Eq. Juris., Section 302; Story, Eq. Juris., Sections 64, 81; *Browning* v. *Morris*, Cowp., 790; *Mare* v. *Sanford*, Giffard, Ch. R., 288, 295; *Atkinson* v. *Denvy*, 6 H. and N., 778; S. C. 7, *Id.*, 934.

As to the one hundred and thirty-five thousand dollar transaction, certainly this liability is not affected by reason of the non-liability under the usury statute of the State for usurious interest voluntarily paid, for that statute does not apply to this transaction.

For the reasons above stated, the demurrer to the bill must be overruled, and the bill may be retained to determine the liability of the defendant in respect to the illegal interest received.

Demurrer overruled.

Treat and Krekel, JJ., concur.

UNITED STATES CIRCUIT COURT—MISSOURI.

Mere honest inaction in a poor man, when a creditor seeks to make by law a just debt, is not in itself an act of bankruptcy. Adjudication of bankruptcy will be reversed when the only act of bankruptcy charged was

"that the bankrupt suffered his property to be taken on legal process with intent to give a preference."

Wright *v.* Filley.

Wright was proceeded against in the District Court for the Eastern District by Filley, a creditor, under the 39th Section of the Bankrupt Act. The act of bankruptcy charged was that Wright had "suffered his property to be taken on legal process with intent to give a preference."

To establish this the creditor relied on the fact that Wright was indebted to one Carr on two promissory notes; had been sued by Carr on one of them; had made default, and allowed judgment to pass against him, and certain land to be seized and sold on the execution issued thereon.

The testimony of Wright on the hearing in Bankruptcy Court, showed that he had no defense to the note. He says, *inter alia*, "I did not see Carr before he brought suit—I forgot the suit, being out of town the time it was to come off. After he got judgment, I endeavored to settle the matter with Carr. He brought suit on the other note, to which I put in a defense, and which is still pending. After judgment I tried to get Carr to wait on me, to effect a compromise with him, and to prevent my property from being sold under his execution, but he would not consent. I had no desire or intention to give Carr any preference, or to prevent my property being distributed under the Bankrupt Act."

The evidence fairly negatived any actual interest on the part of Wright to give Carr a preference or to defeat or delay the operation of the Bankrupt Act. Wright was not a banker, merchant, trader, or manufacturer. The District Court (Judge Krekel sitting in the place of Judge Treat) adjudged Wright to be a bankrupt. To reverse the order Wright filed the present bill in this court under the 2d Section of the Bankrupt Act, and the matter was argued before Justice Miller, at the October term, 1870.

Dryden, Lindley & Dryden, for Wright.

Samuel S. Boyd, for Filley.

MILLER, J.—This is a bill in chancery filed in the Circuit Court for the District of Missouri, to obtain a review and reversal of the order of the District Court declaring the complainant to be a bankrupt.

The parties waive all question, whether this is the proper mode of obtaining a review of such an order, and desire the Circuit Court to pass on the merits of the case.

The complainant was declared a bankrupt at the suit of his creditors, and the only ground on which the order can be sustained is, that he suffered a judgment for a small amount, less than two hundred dollars, to be obtained against him, on which an execution was issued and levied on some of his property.

It seems clear that the complainant was quite poor, and that it might have given him serious inconvenience to have paid a lawyer to prepare his papers for voluntary bankruptcy or to have given security for the fees in such a proceeding.

The debt on which the judgment was procured was a real debt, was due and unpaid, and he had no defense against it.

There is not the least reason to suppose that he desired to give the creditor who got the judgment any preference or advantage over his other creditors, or that he, in any manner whatever, suggested or encouraged the suit, or the levy of the execution.

It is, therefore, clear that the order of bankruptcy only can be sustained on the ground that he did not go into voluntary bankruptcy when he was sued, and that his failure to do so, when he was able to do so, was itself an act of bankruptcy.

I have read the opinions of several eminent district judges, asserting this doctrine as essential to the due administration of the Bankrupt Law, and have the highest respect for these judges, and especially for the one who made this order, and I have held up this case to see if I could bring my mind to its adoption.

But I cannot satisfy myself that mere honest inaction in a poor man, when his creditor seeks to make by law a just debt, is itself an act of bankruptcy, and if Congress means that, they must,

so far as I am concerned, say it in plainer terms than are to be found in the present law.

Let a decree be entered, reversing the order of bankruptcy rendered in the District Court. Ordered accordingly.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

The debtor, being a resident of St. Louis with his family, bought a stock of goods in Montana in July, 1869; went to Montana in August, 1869, leaving his family in St. Louis; remained in Montana, except a few weeks, when on a business trip to St. Louis, until June, 1870; a petition in bankruptcy was filed against him in the Eastern District of Missouri, July 8th, 1870.

Held, that Montana was his place of *residence* within the meaning of the Bankrupt Act, during the six months preceding the filing of the petition; the word "residence" in Section 11 not being synonymous with the word "domicile."

Petition dismissed for want of jurisdiction.

In re WATSON.

TREAT, J.—On the 8th day of July, 1870, a petition with proofs was filed, to have defendant adjudicated a bankrupt, under Section 39 of the Bankrupt Act. From the evidence offered it is clear that he had committed one or more of the acts of bankruptcy charged.

The case, however, must turn on a jurisdictional question.

On the 1st of July, 1869, defendant purchased of Kintzing, in St. Louis, a stock of goods, etc., in Montana, for seventeen thousand dollars, giving his notes therefor. Then he proceeded to New York, bought goods to be shipped for the purpose of replenishing the Montana store, to the amount of ten thousand dollars, paying only one thousand dollars cash. He also bought on credit goods in St. Louis to the same end.

He was a married man, with four children, residing in St. Louis. In August, 1869, he left St. Louis for Montana, without his family, intending, as he swears, to reside permanently in that Territory. After reaching that place, and attending to

his business there for a few weeks, he visited St. Louis on business matters, connected with his Montana affairs, and returned to Montana about January, 1870. His commercial paper had, to some extent, matured, without payment, and towards the middle of February suits by attachment were brought against him in Montana, and his property seized thereunder. He continued in that Territory, with reference to his business there, until the middle of June, when he returned to St. Louis, where, in less than a month, this proceeding under Section 39 of the Bankrupt Act was commenced.

The questions pertaining to citizenship, domicile, and residence, with reference to the terms of that act, have been presented.

What are the elements of "citizenship," the court, in this case, is not required to decide. "Domicile," as defined by jurists, and as settled by the United States Supreme Court, depending in part on the *animus* of the person, is not a proposition involved in the construction of this statute. Congress, in its wisdom, has chosen to exact that applications in bankruptcy shall be made, "in the judicial district in which such debtor has *resided*, or carried on business, for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months," the petition to set forth his place of *residence*, etc.

In this case the debtor had resided *actually*, excepting during the short time he visited St. Louis on his Montana business, for more than ten months in Montana, and had carried on business as a merchant solely in that territory. There his property was situated and had been seized on attachment. True, he had not removed his family to Montana, although it had been his intention to do so. It is unnecessary to discuss the presumptions as to domicile arising from that fact; for the Bankrupt Act, it is clear, uses the term "residence," specifically as contradistinguished from "domicile," so as to free cases under it from the difficult and embarrassing presumptions and circumstances upon which the distinctions between "domicile" and "residence" rest. The debtor's residence was, during the pre-

ceding ten months, in Montana, and his sole place of business was there. His property, and the suits brought against him—indeed, all that could be beneficially reached by proceedings in bankruptcy—have reference to what was there, or being done there.

This case furnishes an apt illustration of the rule fixed by Congress. If the debtor could be declared bankrupt by this court, and his estate adjudicated here, then every effective step with reference thereto would have to be taken by his assignee in Montana, involving not only the care of his property, all of which is there situated, but also the conduct of defenses in suits there pending, and the dissolution of attachments in the Territorial courts. If the debtor was adjudicated bankrupt in that Territory, all matters connected with the administration of his estate could be more conveniently and satisfactorily adjusted there.

But the pure legal question is, whether the term "residence" is synonymous with "domicile," as used in the Bankrupt Act, orwhether that term is used in its accurate legal sense, and is to be so applied.

On that point, this court has no doubt. The proceedings in bankruptcy should be instituted with reference to the actual residence of the party, or his place of business. His domicile may be in a remote State, and yet he may be residing and carrying on business here; and if his creditors are compelled to ascertain where his domicile is, with the vague basis of the *animus revertendi*, or *animus manendi*, before securing their rights in the premises, they will necessarily be remitted to doubts and uncertainties, instead of open, visible, and positive facts. "Residence" is a fact easily ascertained; "domicile" a question difficult of proof. True, the two terms are often used as synonymous, but in law they have distinct meanings. The vexed questions concerning citizenship, domicile, and residence, under the United States Constitution, so far as the respective States of the Union are concerned—with respect to which there are many conflicting views in decisions of courts and among commentators—are easy of solution in the light of elemental

principles; but Congress, as if *ex industria*, designing to escape that region of dispute, used a legal term about which there is no difficulty, either as to its accurate meaning, or as to the facilities of proof connected with it.

The "residence" of the debtor was in Montana during all of the previous ten months, except the last few weeks, and the petition in bankruptcy should have been filed there. Hence this court dismisses the petition for want of jurisdiction.

UNITED STATES SUPREME COURT.

Error to the Circuit Court of the United States for the District of Kansas.

Where the record before the court does not show that a precedent agreement existed, it is not to be assumed. A mere promise does not constitute an agreement.

Any agreement by an insolvent debtor with a creditor (a bank) to create a preference in favor of that creditor is void if the creditor has cause to believe the debtor insolvent, and he is afterwards proceeded against under the Bankrupt Act.

Transfers of personal property, consisting of a stock of goods by an insolvent, only take effect from its delivery.

An unregistered personal mortgage is not valid in the State of Kansas as against creditors.

Where the mortgagor remained in possession of his stock of goods, the property mortgaged, and continued with consent of the mortgagee to make sales therefrom, the mortgage does not constitute a lien.

THE SECOND NATIONAL BANK OF LEAVENWORTH *et al. v.* HUNT, *Assignee of* KELLER & GLADDING.

FIELD, J.—This was an action brought by the assignee in bankruptcy of Keller & Gladding to recover of the Second National Bank of Leavenworth the value of certain property alleged to have been transferred to it by them in fraud of the provisions of the Bankrupt Act.

On the trial evidence was introduced on the part of the plaintiff, tending to show that the bankrupts had made a conveyance of their property to the defendants when they were insolvent, and that the defendants had reasonable grounds for believing that the bankrupts were in this condition at the time; that the transfer was not made in the ordinary course of

their business; and that, on the 1st day of August, 1866, they executed a chattel mortgage on portions of their property to the cashier of the bank to secure the payment of two notes, each for four thousand dollars, belonging to that institution. Whereupon evidence was given on the part of the defendants, tending to show that the bankrupts, in conversations preliminary to the execution of the chattel mortgage, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promised its president to deliver to the bank, whenever it should desire, the entire stock of goods which they might have at the time on hand; that in February, 1867, in pursuance of this agreement, they delivered a portion of their stock, amounting in value to two thousand five hundred and forty-two dollars, and in July following they turned over the balance to the bank.

Evidence was also given, tending to show that the bankrupts continued to sell the goods included in the mortgage, and all other goods at their store, with the consent of the defendants, until the transfer in July, 1867, and that this was contemplated by the parties when the mortgage was made.

The defendants thereupon prayed the court to instruct the jury, that if they "believe from the evidence that the conveyance by Keller & Gladding in July, 1867, was made in pursuance of the original agreement between them and the bank, they are to regard the sale or transfer as valid, and not as made in contemplation of evading the provisions of the Bankrupt Law." The court refused to give the instruction, and the defendants excepted. The correctness of this refusal is the question presented for our consideration.

The question is one easily answered. It would have been error to give the instruction requested, for it assumes that there was an original valid agreement between the parties that the plaintiffs should deliver to the bank the entire stock of goods when desired.

In the first place, the record does not disclose that any such agreement was established; it only discloses that the evidence introduced tended to show that, in conversations preliminary

to the execution of the mortgage, the bankrupts made a promise to the president of the bank to that effect.

Courts cannot assume, in their instructions to juries, that material facts, upon which the parties rely, are established, unless they are admitted, or the evidence respecting them is not controverted. The courts would otherwise encroach upon the appropriate and exclusive province of juries.

In the second place, the supposed agreement, if established, was void as against other creditors of the bankrupts. It did not create any lien upon the property, or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the Bankrupt Act. The subsequent sale, even if made in pursuance of the agreement, did not take effect by relation at its date. Transfers of personal property, situated like the property in this case, only take effect as against creditors from its delivery to the purchaser.

The stipulation in the chattel mortgage, providing that in case of default in the payment of the notes or interest, it should be lawful for the cashier of the bank to take possession of the property and sell the same, does not aid the defendants for two reasons, both equally conclusive. 1st. The mortgage was never deposited in the office of the Register of Deeds of the county where the property was situated or the mortgagors resided, and was therefore void as against creditors under the statute of Kansas. 2d. The mortgagors remained in possession of the goods notwithstanding the mortgage, and by its terms; and the testimony tended to show that they continued to sell the goods, with the assent of the defendants, until the transfer in July, 1867. The court could not assume the instrument to be valid in the face of this testimony, for if the facts were found by the jury which the testimony tended to establish, the mortgage was fraudulent and void as against creditors.

In any view of the case the instruction prayed was properly refused.

Judgment affirmed.

UNITED STATES DISTRICT COURT—E. D. PENNSYLVANIA.

The dower right of the wife of a bankrupt is not divested by proceedings under the Bankrupt Act.

In re ANGIER.

IN pursuance of the order of the Bankruptcy Court, an assignee offered for sale certain real estate of the bankrupt, and at the sale, stated that the same would be conveyed to the purchaser free of all charges and incumbrances.

A motion to confirm the sale having been made, an exception was filed by the purchaser, that the wife of the bankrupt would be entitled to dower in case she survived him.

Crawford, for the purchaser, cited *Eberle* v. *Fisher*, 1 Harris, 526; *Worcester* v. *Clark*, 2 Grant, 84.

Sellers, for the assignee, contended that the Act of 1867 operated to divest the estate of the dower right; that the exceptions contained in Section 14 did not save the rights of married women; that the Act of 1841 divested dower, and that the case of *Worcester* v. *Clark*, *supra*, was not in point.

CADWALADER, J.—The wife's right of dower having been established by the Pennsylvania decisions against the assignee in insolvency, there is no doubt that the purchaser's objection to the title is valid.

UNITED STATES DISTRICT COURT—W. D. PENNSYLVANIA.

Proof of debts against the estate of a bankrupt must be made before the Register, even though proceedings in bankruptcy have been superseded by arrangement under Section 43 of the Bankrupt Act.

In re BAKEWELL.

JAMES T. BRADY & Co. have offered to make proof before the Register of a debt against the estate of said bankrupt, and upon notice being given to the trustees of said bankrupt, acting under the provisions of Section 43 of the Bankrupt Act, John M. Kennedy, Esq., their solicitor, appears, and *pro forma*

resists the offer on the ground that the bankruptcy proceedings have been stayed, and that the trustees themselves have the sole power to admit claims against the bankrupt's estate, and that only in the case of contested claims can the powers of the court and Register be invoked. This position of the trustees' solicitor is based upon the decision of Judge Treat, in the District Court for the E. D. Missouri. *In re* Darby, 4 N. B. R., 211, 309.

In this matter the bankruptcy proceedings have been stayed—they having been superseded by arrangement under Section 43. The provisions of that section are extremely vague, and it is difficult to determine what the trustees may or may not do. In this matter, however, we are not called upon to say what the powers of the trustees are, save in respect of the allowance of claims against the bankrupt's estate. The decisions upon the 43d Section have been but few, and none of them bear upon this question but the case cited by the trustees' solicitor. In that case Judge Treat says: "Whenever the trustees and committee are satisfied that demands are correct, and need no testimony to be taken, they can allow the same. When they are not satisfied the demand should be proved before the Register on notice to the trustees. All demands not allowed already should be presented to the trustees for allowance, in the first instance, and, if allowed by them, no further action need be had; but if the trustees demand proof, they can apply to the Register or judge for an order to have testimony taken with respect thereto before the Register, or otherwise, and for the claims to be passed upon by the Register."

From this opinion I am compelled to dissent. I cannot find anything in the statute to justify it, but everything to deny its correctness. The first clause of Section 27 provides "that all creditors *whose debts are duly proved* and allowed shall be entitled to share in the bankrupt's property and estate *pro rata*," etc. Of course none others shall be entitled to share in the assets. Due proof of a debt can only be made by compliance with the 22d Section of the act. The second clause of that section provides: "To entitle a claimant against the

estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation before the proper Register or Commissioner, setting forth the demand," etc. From these two clauses it is clear that to entitle a claimant to have his demand, and to share in the estate, he must prove his debt in the manner provided by Section 22. The trustees cannot make distribution of the estate to and among any other persons than those mentioned in Section 27, as entitled to share therein, that is to say, "creditors whose debts are duly proved and allowed."

But there is more in the act than this. Section 43 preserves the bankrupt's right to apply for and obtain his discharge, as though the ordinary proceedings under the act had continued. Section 29 provides, that when the bankrupt files his petition for discharge, notice is to be sent by mail to all creditors who have proved their debts. If, then, the trustees have power to allow claims not duly proved, such creditors would not be entitled to notice of the application, and the discharge might be granted without their knowledge. Such a result was never intended. If the bankrupt's estate is not equal to fifty per centum of his liabilities (as principal debtor) duly proved, he must, in order to obtain a discharge, file the assent in writing of a majority in number and in value of his creditors who have proved their claims, to whom he is liable as principal debtor. If the rule *in re* Darby be correct, the creditors whose claims were allowed by the trustees, without being duly proved, would be excluded from the operation of this section, because the trustees had not disputed their claims and compelled them to make due proof.

The bankruptcy proceedings may be resumed by order of the court, on sufficient cause being shown therefor, as the bankruptcy proceedings are only stayed until the further order of the court. No cause for resuming such proceedings can come to the knowledge of the court unless some party in interest makes complaint. Such complaint coming from a creditor should be from one who has proved his debts, one whose name is upon the records of the court.

It may be said, that under arrangement the trustees and committee of creditors may devise a system of their own for ascertaining the legal claims upon the estate. Such a suggestion involves the idea of judicial powers which the trustees and committee do not possess. There are numerous intricate questions as to what are provable and what are not provable debts, arising in bankruptcy proceedings, which trustees and committees would never discern, resulting oftentimes in the recognition and allowance of non-provable debts, to the injury of the general body of creditors. To say that trustees have power to allow debts without the form of regular proof, is certainly to say that they have the power to reject. Both powers certainly reside in them, or neither.

If, then, the trustees have power to allow claims, it must follow that they must have judicial powers, and that in the exercise of such powers they determine the claims allowed by them as provable debts, when in fact they may not be provable. Having then allowed non-provable debts, they have gone one step towards determining a rule of their own for distributing the assets of the bankrupt, and their right to so determine may as well be recognized fully. But such a thing will not be contended for. No one will pretend that distribution can be made by the trustees to and among any but those whom the Bankrupt Act specifies.

There are still other considerations which enter into this question, but it is unnecessary to refer to them. Enough has been said to show that the provisions of the Bankrupt Act relating to the proof of debts, are as much in effect under arrangement as under the regular bankruptcy proceedings. Hence it follows, that James T. Brady & Co. have the same right, and are as much bound to make due proof of their debt before the Register, as though the proceedings in bankruptcy had not been superseded by arrangement.

SAMUEL HARPER,
Register.

M'CANLESS, J.—After a careful consideration of the opinion

in re Darby, I am constrained to differ with my brother Treat, of the Eastern District of Missouri.

To properly construe the 43d Section, we must take the whole act together, and in doing so I can arrive at no other conclusion than that presented in the decision of Mr. Register Harper, which is hereby affirmed.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

Sections 35 and 39 of the Bankrupt Act of March 2d, 1867, must be construed together, and an assignee is not entitled to any greater rights in respect to recovering back money or other property under the 39th Section than he is entitled to under the 35th Section.

When he seeks to recover back money paid with a view to give a preference to a creditor, he must show, in order to entitle himself to recover, that the preference was given within four months before the filing of the petition in bankruptcy.

* ROBERT J. HUBBARD AND ANDREW J. HENNION *v.* THE ALLAIRE WORKS.

In Equity.

BLATCHFORD, J.—This was a bill in equity, praying that a judgment rendered in favor of the defendants against the bankrupts, and all proceedings thereunder, including an execution issued thereon, and a sale of property of the bankrupts on such execution, might be decreed to be null and void, and that the defendants might be required to account for and pay over to the plaintiffs, as assignees of the bankrupts, such sums of money as they had received by virtue of the judgment and the proceedings thereunder. The defendants had a claim against the bankrupts amounting to four thousand six hundred and fifty-four dollars and forty-four cents, with interest from October 18th, 1867. On the 28th of October, 1867, the defendants commenced an action against the bankrupts in the Superior Court of the city of New York, to recover the said claim. The bankrupts, in pursuance of an agreement to that effect made by them with the

* 7 Blatchford, 284.

defendants, appeared in the suit by attorney, and, without availing themselves of the twenty days delay allowed by law, consented in writing to the entry of a judgment in the suit in favor of the defendants, by serving on the defendants, on the 31st of October, 1867, an offer in writing to allow judgment to be taken for said sum. On the 1st of November, 1867, the offer was accepted by the defendants, and, on the 2d of November, 1867, a judgment was entered and docketed in said court, in favor of the defendants against the bankrupts, for four thousand six hundred and eighty-six dollars and sixty cents, being the amount of said claim and interest and costs of suit. On the same day an execution was issued on the judgment to the Sheriff of the City and County of New York. Under that execution and other executions, the sheriff seized certain personal property of the bankrupts, and, on the 14th of March, 1868, sold it and realized for it a sum, out of which the amount of the judgment, with interest from Nov. 2d, 1867, namely, four thousand eight hundred and six dollars and ninety-four cents, was paid to the defendants. The claim on which the judgment was recovered, was one which existed on the 18th of October, 1867. On the allegations in the bill, the bankrupts, at the time of the confession of judgment and of the entry thereof, were insolvent, and the officers of the defendants, they being a corporation, had reasonable cause to believe that the bankrupts were so insolvent, and that the transaction was one in fraud of the provisions of the Bankruptcy Act. On the 27th of March, 1868, a petition in involuntary bankruptcy was filed, in the District Court of the United States for this district, against the bankrupts. On the 17th of April, 1868, they were adjudged bankrupts, and the plaintiffs were afterwards duly chosen to be their assignees. The case now came before the court on a plea put in by the defendants to the bill. The plea did not aver when the property of the bankrupts was seized on the execution, nor did the bill aver when it was so seized. But the plea averred that the execution was levied on the property more than four months before the filing of the

petition in bankruptcy. The plea pleaded in bar of the bill the fact that the judgment was entered and execution thereon was issued, and the levy thereunder complained of in the bill was made more than four months before the filing of said petition, and that no part of the property of the bankrupts mentioned in the bill was attached, sequestered, or seized on execution under or by virtue of the judgment, within four months before the filing of the said petition. The plaintiffs did not take issue on the plea, but demurred to it, and the question whether the plea should be held good and allowed, was argued.

James Emott and *John McDonald*, for the plaintiffs.

Charles A. Rapallo, for the defendants.

BLATCHFORD, J.—The question involved in this case is, whether the plaintiffs can recover, in view of the fact that the property in question was not seized on execution within four months before the filing of the petition in bankruptcy against the bankrupts, although it was so seized within six months before such filing. My attention has not been called to any adjudication in which the point appears to have challenged attention. The case of *Graham* v. *Stark*, 3 N. B. R., 93, *quarto*, is, in its facts, an authority in favor of the plaintiffs. The preference to the creditor, in that case, was given within six months before the filing of the petition in bankruptcy, although not within four months, and the preference was set aside on proceedings taken by the assignee in bankruptcy. But the point as to the four months' limitation is not adverted to by the court in its decision, nor does it appear that it was taken by counsel.

I have always regarded it as clear that Sections 35 and 39 of the Bankruptcy Act must be construed together and made to harmonize, and effect be given to every provision in each of them. In this view, and on a consideration of the entire statute, I do not think that an assignee is entitled to any greater rights in respect to recovering back money or other property under the 39th Section than he is entitled to under the 35th. Under the 35th Section, some effect must be given to the four

months' limitation therein prescribed. The second branch of that section, which concerns the six months' limitation, does, in terms, include the transaction in question in this case; and, if there were no such provision in the statute as that found in the first branch of the 35th Section, the plaintiffs' right to judgment on the plea, would be clear. But the two branches of the 35th Section must be construed together, and a scope of operation given to each of them, if possible. If the second branch, with its six months' limitation, is to be held to cover every case, as well that of a preference to a creditor, as all other cases, the first branch is useless, and might as well have been omitted. But the first branch, which is the partial clause, precedes the second branch, which is the general clause. The first branch provides for the case of a transaction done with a view to give a preference to a creditor or person having a claim against a debtor, or who is under any liability for him. In such case, if the transaction takes place within four months before the filing of the petition in bankruptcy, and the other circumstances specified exist, the transaction is made void. The second branch must be held to be intended to provide for any disposition of property that is not provided for by the first branch, that is, for any disposition that does not give such a preference as the first branch provides for. But, whenever a case falls within the first branch, it must, although it may also be in terms within the second branch, be tested as to its validity and as to the limitation of time prescribed, exclusively by the provisions of the first branch.

It results, from these views, that the plea must be allowed, and the bill be dismissed, with costs.

UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

In an action for trover brought by the assignee in bankruptcy, he undertook to set out in detail in his declaration the manner in which he claimed to have become the owner of the property, but failed to allege an adjudication in bankruptcy,

Held, that the declaration was bad, in substance, on demurrer, as an adjudication of bankruptcy was an essential prerequisite and precedent condition of the power of the Register to make an assignment.

ISAAC H. WRIGHT, *Assignee of* LYMAN HITCHCOCK & SAMUEL K. PLACE *v.* JAMES JOHNSON.*

WOODRUFF, J.—The action herein is trover. It is brought to a hearing upon certain demurrers of the defendant to some of the plaintiff's replications to the defendant's special pleas, and upon demurrers of the plaintiff to some of the defendant's rejoinders to other replications of the plaintiff. These pleadings and demurrers and the particulars thereof, it is not necessary to notice further, or to express any opinion thereon.

The plaintiff correctly insists, that, "as a settled rule of pleading, judgment on demurrer will pass against the party guilty of the first fault in pleading, even in substance." This rule is fatal to him in the present case. He has seen fit to set out in detail the manner in which he claims to have become the owner of the property for the conversion of which the action is brought. I express no opinion upon the question whether it was necessary that he should do so, or on the question whether, if he attempted to allege the proceedings in bankruptcy, he should have stated the contents of the petition to the District Court, or of the schedule and inventory annexed thereto, with greater particularity. Not being advised to aver property in the goods generally, and rely thereon, he alleges the presentation of a petition by Hitchcock & Place, with schedule and inventory (with so much of particularity as the pleader deemed necessary), and then avers the issuing of a warrant by a Register in bankruptcy, notice to creditors, a meeting of creditors, the choice of the plaintiff as assignee, and the execution, by the Register in bankruptcy, of an assignment of the property of Hitchcock & Place to him as such assignee. It is not averred that Hitchcock & Place have been adjudged bankrupt.

I am not called upon to deny that the jurisdiction of the district in bankruptcy is general over that subject, so that (when it is necessary to state and rely upon its proceedings),

* 8 Blatchford, 150.

after the allegation of such facts as give to that court jurisdiction of the parties, it is sufficient to allege, *taliter processum fuit*, as to all intermediate steps down to the particular act of the court which it is material to aver. But if the plaintiff undertakes to set out the proceedings to sustain the act of the Register in making an assignment of the property of other persons to the plaintiff, he must state such proceedings as authorized the assignment. Here the plaintiff makes title, not by transfer from the former owners, Hitchcock & Place, but by a transfer made to him by a Register in bankruptcy without averring that Hitchcock & Place have ever been adjudged bankrupt. Section 11 of the Bankrupt Law provides, that the filing of the described petition, schedule, and inventory shall be an act of bankruptcy, and that the petitioner shall be adjudged a bankrupt. Then, and not until then, the warrant issues, notice to creditors is given, an assignee is chosen and qualified, and, when there is no opposing interest, the Register, by Section 14, is authorized and directed to assign the estate, real and personal, of the bankrupt to the assignee.

I am of opinion, that the adjudication that the petitioners are bankrupt, is an essential prèrequisite and precedent condition of the power of the Register to make any such assignment. True, the filing of the petition is an act of bankruptcy, but the adjudication is the judicial ascertainment and declaration of the fact, that the petitioners are legally bankrupt, upon which all the subsequent proceedings are founded. It is the act by which the court takes hold of the subject matter, applies to it its jurisdiction, and gives legal effect to what the statute declares to be an act of bankruptcy. Until that adjudication, I perceive no doubt that the petitioner may withdraw his application, and nothing further be done therein as a voluntary application.

The plaintiff's endeavor herein to show actual ownership of the goods by setting out the proceedings on which he relies to establish title, therefore, fails. If he choose to set out the manner in which he acquired title, his declaration should show that the proceedings are such as make the transfer to him legal and valid.

Judgment must, therefore, be ordered for the defendant, but with leave to the plaintiff to amend his declaration, on the usual terms.

Sterbuck & Sawyer, for the plaintiff.

Bernard Bagley, for the defendant.

UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

The assignee in bankruptcy of a manufacturing corporation having sold at auction, in one parcel, for a greatly inadequate price, two separate mills, each completely furnished with machinery; a hotel; a store; twenty dwelling houses, each susceptible of separate occupation; and sundry vacant lots, not necessary to the use of the mills, subject to a mortgage on the whole, and the property having been purchased at such sale by a combination of certain creditors of the corporation, while other creditors were ignorant of the time and place, and even of the fact of the contemplated sale; and such ignorance was known and acted upon by the agent for the purchasing combination, the sale was set aside on the application of such other creditors.

The facts, that such other creditors had not made formal proof of their debts, and even that the claim of such other creditors was disputed, was held to be of no importance on such application.

Provisions proper in the order for a resale suggested.

The creditors who applied to set aside the sale, having in such application offered to bid, on a resale, a specified sum more for the property than it was sold for, were held to be bound to fulfill their offer.

In re The Troy Woolen Company.*

Woodruff, J.—It would, I think, be a gross discredit to the administration of justice if the sale of the bankrupt's estate, made as was the one now in question, and at so great a sacrifice, that real estate, mills, water-power, and machinery of great value, have, in the administration of the assignee, been rendered worse than valueless, should be permitted to stand. Without entering fully into the details, I have no doubt of the power of the District Court over the subject. Nor have I any less doubt that the discretion confided to the assignee, in regard to the manner of the sale, was greatly misused. No sufficient reason appears, in the proofs, for the sale of two separate mills, each completely furnished with machinery, a hotel, a store, twenty dwelling houses, each susceptible of sep-

* 8 Blatchford, 465.

arate occupation, and sundry vacant lots not necessary to the use of the mills, at auction, in one parcel.

The suggestion that the whole was mortgaged, may furnish a reason for selling the property clear of the mortgage, and paying the mortgage debt out of the proceeds; but it seems to me quite obvious, that had there been no combination among the creditors to purchase the whole, in the expectation, that, if offered in gross, subject to the mortgages, it would bring but a small amount, such a sale would not have been seriously contemplated.

It is possible that the technical formal requisites to a regular sale were observed, but it is reasonably clear from the proofs, that the ignorance of the petitioners, Cooper, Vail & Co., of the time and place, and even of the fact of the contemplated sale was known, contemplated, and acted upon, with a view to a purchase of the property by the trustee for the other creditors, at greatly less than its value; and, while I would not assert, that, under no circumstances, may a portion of the creditors unite in a purchase for the joint benefit of themselves, it ought at least to appear that the sale has been so conducted that no prejudice has come to the other creditors.

The suggestion that the claim of Cooper, Vail & Co., as creditors, is disputed, and that they have not made formal proof of their debt, was properly held to have no weight upon the motion. They were properly before the court, petitioning for the protection of whatever may be found due to them. That amount will be rightly otherwise settled, and could not be settled on this motion.

The order appealed from must be affirmed, and the District Court will be left to make such further order regulating the resale and the notice thereof which should be given, as may be proper. The sale and conveyance being set aside, a resale can be had; and out of the moneys in the hands of the assignee, and the proceeds of the resale, there will be no difficulty in refunding to the late purchaser the amount of his bid, and such expenses as he has reasonably and properly incurred in the preservation of the property; and his reconveyance to the as-

signee, or the purchasers, will be proper, though, probably, not indispensable. The petitioners, Cooper, Vail & Co., should however be held to their offer to bid ten thousand dollars more for the property; and no resale should be made unless they will commence the bidding by that advance on the former sale, unless the District Court, in giving further directions touching the resale, should deem it most advantageous to sell the property in parcels, in which case such a bid might be impracticable. The petitioning creditors will, however, in such last case, appreciate the responsibility they have assumed, in asking that the sale be set aside upon their offer of the advanced price, and will be bound to fulfill their pledge.

Edward F. Bullard, for the petitioners.

John Ganson, opposed.

UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

A preference to a creditor will not be declared void under the Bankrupt Law, unless made within four months before the filing of the petition.

The concluding sentence of Section 39 is to be read and understood with reference to the previous provisions of the act, and should be construed just as it would if the words "subject to the limitations and provisions of the 35th Section" had been added thereto, or inserted therein; as it is the duty of the court to harmonize the sections, instead of construing the latter as an abrogation of the former.

It was reasonable that the assignee should file the bill in this case, therefore it will be dismissed, but without costs to either party.

GEO. K. COLLINS, *Assignee of* FRANK E. GRAY, *v.* JUSTUS GRAY AND FRANK E. GRAY.*

WOODRUFF, J.—If the transfers sought to be set aside by the bill in this suit, which were made by the bankrupt to his father, Justus Gray, were made with intent to hinder, defraud, or delay the creditors of the latter, or with a view to prevent the application of the property transferred to the payment of his debts, or its coming to the possession of an assignee in bankruptcy for distribution to his creditors, or if such trans

* 8 Blatchford, 488.

fer were fraudulent as against creditors, upon the general principles governing the subject, then the assignee would be entitled to have the transfers declared void, and to recover the property from the defendant, Justus Gray. But the proofs fail to satisfy me that the transfers were so made, or were, in that sense, fraudulent.

It is in some doubt, upon the proofs, whether, at the time when the transfers were made, Frank E. Gray, the bankrupt, believed, or had reason to believe, he was insolvent, and in still greater doubt, whether the father, Justus Gray, or his agent in the transaction, Martin S. Gray, either knew or believed, or had reasonable cause to believe, that Frank was insolvent at that time, and that the transfers were made in fraud of the provisions of the Bankrupt Act. Upon all the proofs, however, I should feel compelled to infer, that, at that time, they all acted upon an apprehension that the money due to the father, Justus Gray, was insecure, and that, unless its recovery was secured by some transfer of property or security thereon, there was danger that it would be lost. This danger arose from the evident failure of Frank to manage his affairs successfully, and the evidence that his debts were increasing, and that he was in want of more money to carry on his business. Belief of this made the father and his agent unwilling to lend Frank more money, and created a desire to secure what was then due.

But assuming that Frank was, in fact, insolvent, and that his father and brother had reasonable cause so to believe, I think the proof fails to show that they acted dishonestly in the matter, or that there was any design, purpose, or intent, except to secure payment of what was justly due. Transactions of this sort between near relatives are to be closely scrutinized, because it is among relatives that arrangements are more frequently made to conceal and cover up property for the future benefit of insolvent debtors, or their families. Nevertheless, relationship of the parties is not, *per se*, evidence of fraud, nor should the kind and liberal treatment of a son by a father deprive the latter of a just view of his actual rights.

The most favorable view to the plaintiff which, I think, can be justly taken of the transaction in question, is, that the father having, from time to time, assisted his son, and finding that he did not appear to prosper, but was applying for still more money, became desirous of securing what was due, and the transfers in question were made and accepted in satisfaction of the then actual indebtedness. In view of the right to occupy the hotel for one year thereafter, without paying rent, the consideration of the transfer was not inadequate, so as to raise any presumption of want of entire good faith.

Taking the transaction as a giving of preference to the father as a creditor, while the debtor was insolvent, or in contemplation of insolvency, and assuming that the father had reasonable cause to believe that his son was insolvent, the case exhibits no features but those described in the first clause of Section 35 of the Bankrupt Act. By that clause, if such a transaction be made within four months before the filing of the petition wherein the debtor is declared bankrupt, the same is declared void, but not otherwise. Although the Bankrupt Law aims at an equal distribution of all the property of a debtor among his creditors, from the time he becomes insolvent, or contemplates insolvency, and is intended to disallow preferences given by a debtor to favored creditors, it goes no further, when preference alone is the subject of complaint, than to avoid such as are given within four months before the filing of the petition.

If in all other respects the transfer is free from fraud or illegality, the law allows no attack to be made upon it after four months have elapsed. On this point, the clause of the 35th Section, above referred to, is special and specific; and, although, on a cursory perusal, Section 39 seems to give a longer time within which to impeach such transfer, I concur in the decisions which hold that the 39th Section must be construed in subordination to the specific language of the clause referred to, which defines the precise effect of an honest preference, given to a creditor by his debtor, though insolvent. (*Hubbard* v. *The Allaire Works*, 4 N. B. R., 623; *Bean* v. *Brookmire*, 4 N. B. R., 196.

To hold that, under the 39th Section, a transfer, or conveyance giving a preference to a creditor is void, if made within six months before petition filed, and thereupon the assignee may recover back the property, is to render the specific provisions of the first clause of the 35th Section wholly nugatory and inoperative. It is the duty of the court to so construe a statute that every part of it may have effect, if that can be done. There is, in fact, no necessary inconsistency between the two. The 39th Section defines and declares the various acts which shall be deemed "acts of bankruptcy," and among them, the giving, by an insolvent debtor, of a preference to his creditor; and it authorizes an adjudication declaring one who is guilty of any one of the several acts a bankrupt, if the petition is filed within six months after the commission of the act. It is to this precise point that the limitation of six months in the 39th Section is addressed. If a creditor seeks a decree adjudging his debtor a bankrupt, he must petition therefor within six months after the act of bankruptcy is committed; and the act of bankruptcy alleged may be any one of the numerous causes specified in the section. So far, there is nothing whatever inconsistent with the 35th Section; for, whether the act of bankruptcy be absconding with intent to defraud creditors, or conveying property with intent to delay, defraud, or hinder creditors, or giving a preference, when insolvent, to one or more creditors, in either case, if, within six months, a creditor file a petition, the debtor must be decreed a bankrupt. This may well be held to be the sole purpose for which the six months' limitation is introduced into this section, namely, to limit the time within which creditors must proceed upon an alleged act of bankruptcy, by filing their petition, if they would obtain a compulsory decree. They must file their petition within six months after the act.

The residue of the section does not, in terms, carry the six months into operation. True, if the debtor is decreed bankrupt, the assignee may recover back the money or other property paid, conveyed, etc., contrary to this act; but conveyed when? or paid when? Suppose the act of bankruptcy alleged in the

petition, and on which the debtor is adjudged bankrupt, is a fraudulent suspension of payment for more than fourteen days —how far back can the assignee go to avoid transfers of property intended to give a preference in contemplation of insolvency? The answer to this question cannot be found in the previous clause of the section. It must be sought in the 35th Section; and by that section, preferences given to creditors by insolvent debtors within four months before the filing of the petition are void, and the property may be recovered back. The concluding sentence of Section 39 is to be read and understood with reference to the previous provisions of the act, and will, therefore, be construed in the particular view in question, just as it would if the words "subject to the limitations and provisions of the 35th Section," had been added thereto, or inserted therein. In this view, the two sections are in entire harmony; and it is the duty of the court not to construe the latter as an abrogation of the former, when they can be so harmonized.

The bill of complaint herein must be dismissed. But the circumstances of the case, the somewhat uncertain import of the provisions of the statute, and the doubt of the *bona fides* of the transactions, arising from the proceedings supplementary to execution and the examination before the Register, made it reasonable that the assignee should file the bill, and the dismissal thereof should be without costs to either party.

William C. Ruger, for the plaintiff.

Silas L. Snyder, for the defendants.

UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

A made a transfer of real estate to his son, and nearly two years thereafter, was adjudged a bankrupt on his own petition. The assignee in bankruptcy brought suit against A and his son to set aside the transfer, on the ground that the sale was a sham sale, that the price was greatly inadequate, and that after the sale the bankrupt continued in possession of the property.

Held, that the evidence does not support these allegations in the bill, and it must be dismissed with costs.

Cookingham, Assignee, v. Ferguson.

An intent to give a preference to individual creditors over persons who might charge the debtor with liability for the debts of a corporation, is not such a fraudulent preference as can be impeached under the bankrupt law, as an intent to defraud creditors.

HENRY J. COOKINGHAM, *Assignee of* AMOS S. FERGUSON *v.* AMOS S. FERGUSON AND CHARLES A. FERGUSON.*

In Equity.

WOODRUFF, J.—In its chief characteristics this case is most extraordinary. On the 26th of March, 1866, Amos S. Ferguson was the owner of a farm of thirty-nine acres, in the town of Frankfort, and of sundry articles of personal property, including household furniture, and also of forty acres of land in a western State. He was sick, and insolvent. His chief, and almost sole individual creditors, were his brother-in-law, John W. Bridenbacker, and his brother, James D. Ferguson, who, besides some claims in their own favor against him, were indorsers of his note at bank for six thousand nine hundred dollars, or thereabouts. He was pursued by another party, who alleged that he was a member of a towing company, and, as a stockholder therein, was liable for their debts, by virtue of the statutes of the State. This membership and liability Amos S. Ferguson appeared to have denied, and an action was then pending by which it was sought to charge him therewith. The debts of the towing company were very large, amounting, in all, to upwards of sixty thousand dollars.

In this situation, and in a state of health in which he had been advised that he was liable at any moment to sudden death, from what one of his physicians deemed disease of the heart, he sent for his said brother and brother-in-law to come to his house for a consultation regarding his affairs. He declared his wish and intention to apply his property to the payment of his debts. The proof may be taken to show that he declared his purpose to apply it to the payment of his individual debts, and especially to the protection of them, his principal individual creditors and indorsers, to the exclusion of alleged liability for the debts of the towing company, for one only of which he had then been,

* 8 Blatchford, 488.

or was ever afterwards prosecuted. He proposed to his brother-in-law, Bridenbacker, to purchase his farm, and he declined. He had a son, then twenty-four years of age, who, though residing with his parents, had been for several years doing business on his own account, buying and selling cattle, speculating in grain, and raising and selling tobacco, and therein had made some money, his property then being worth, according to his own statement, which is not disproved, fifteen hundred dollars. As a result of the consultation it is proposed to sell the farm to this young man. To this Bridenbacker and James D. Ferguson not only make no objection, but I think the preponderance of the evidence is that Bridenbacker himself proposed it. The value of the farm is discussed, and seven thousand dollars is agreed upon, both Bridenbacker and James D. Ferguson declaring that seven thousand dollars is an outside price or estimate. The son, Charles, consents to purchase, provided he can be allowed time within which to make the payments; and he is assured by his uncle, Bridenbacker, and in the presence, if not with the express assent of his uncle James, that he shall have all the time necessary, and that they will take care of the note held by the bank, which they had indorsed. There was already a mortgage upon the farm of three thousand dollars, and the balance, four thousand dollars, it was agreed, should be appropriated to their security, or indemnity against their indorsement. An inventory of the farming utensils, and two horses, wagons, harness, sleighs, an interest in two canal boats, and some household furniture, not exempt from execution, is made by Bridenbacker, and, on consultation, and after carefully inquiring into the actual cost of the articles of furniture, an appraisal is made and set down by him, amounting in all to two thousand and eighty-four dollars, against which is set down the sum of four hundred dollars (which, it was agreed between the father and son, on an examination of their accounts, was then due to the young man), and one thousand six hundred and eighty-four dollars is fixed as the sum or balance to be paid therefor. Counsel is sent for, a deed is prepared and executed, a bill of sale of the personal property

is drawn, and bonds and mortgages for the four thousand dollars, payable in sums of one thousand dollars each, at one, two, three, and four years, with intent that the latter should be assigned to Bridenbacker, or to him and James D. Ferguson, for their indemnity. On further consultation, in view of the giving by the young man of his note for one thousand six hundred and eighty-four dollars, payable in one year, with interest, Bridenbacker agrees to receive for the four thousand dollars, four notes, each for one thousand dollars, payable at two, three, four and five years, with interest from date, reiterating his assurance that Charles, the son and nephew, shall have time within which to make the payments; and the notes are made and delivered to Bridenbacker, with the promise of Charles to give him a mortgage on the farm, if he requests it, and Briedenbacker carries the notes away. All this appears to have been quite satisfactory. Charles, the son, takes charge of the farm, and improves it by planting a hop-yard of three acres, and by some ditching, and makes sale of portions of the personal property. His father sells his western land, and, by some trade, makes a further small profit, and, by the contribution of Charles thereto, of some seven hundred and fifty dollars, or nine hundred dollars, a payment of one thousand five hundred dollars is made on the bank note, in relief of Bridenbacker and James D. Ferguson to that extent. Charles pays other debts of his father until, by his payments on his father's account, the note for one thousand six hundred and eighty-four dollars is satisfied. Meantime, the eldest daughter employs herself in teaching music, in which she has before had experience, and earns thereby sufficient for her own clothing and expenses, lodging at home, and contributing small amounts to the support of the family. A younger brother goes to Utica, finds employment, and supports himself. The mother keeps the house as heretofore, and the invalid father and the remaining child, a young daughter, reside with Charles, making up the family.

After a time, and in or about June, 1867, Bridenbacker desiring security for the four thousand dollars, Charles executes and delivers to him a mortgage on the farm, to secure

their payment. In August, 1868, the first mortgage upon the farm, which, on the purchase, Charles had assumed to pay, is called in, and Charles negotiates a loan of three thousand dollars, gives his own obligation, secured by mortgage on the farm, and by other collaterals, and takes up the first mortgage, thus making his mortgage to Bridenbacker a first mortgage on the farm. In all this everything appears to have been done beneficially to Bridenbacker and James D. Ferguson, agreeably to their wishes and assent, and to their entire satisfaction. True, it is testified that James D. Ferguson stated, at the time, that the price to be paid would not be sufficient to pay and protect him and Bridenbacker to the full extent of their liabilities, but he did not then suggest or intimate that the price Charles agreed to pay was not the full value of the property. But, in January, 1868, their brother, Amos S. Ferguson, had made application to the District Court, and was adjudged, thereupon, a bankrupt; and, at some time thereafter, Bridenbacker and James D. began to manifest unfriendliness, in view of the losses they were likely to sustain, and to threaten Charles that, if he did not pay his father's indebtedness to them, they would break up the sale made to him. Their testimony in this suit indicates the ground upon which they intended to assail it, namely, that the sale was a sheer fraud, a cover of their brother Amos's property made to cheat his creditors, and accompanied by an assurance by both Amos and Charles, that they should be paid or protected notwithstanding the sale and conveyance. I do not, as will be presently stated, think such fraud is established, but, taking the claim as made, the practical result is that these uncles, having aided, by their counsels, in seducing the young man into the transaction, having thereby secured to themselves his personal obligations to the amount of four thousand dollars, secured amply by a first mortgage on the farm, having led him to make payments to an amount, in all, more than he was worth when he made the purchase, of which they have largely shared the benefit, to employ his time and industry upon the premises, to some extent improving the same, and to involve himself in further personal responsibility for the

three thousand dollars with which he paid off the prior mortgage and made their four thousand dollars unquestionably secure, after nearly three years have elapsed, threaten, with all the fruits of the transaction still in their possession and enjoyment, to set up this charge of fraud, conceived and carried into execution as the result of their consultation and co-operation, in the hope of reaping, from the setting aside of the fraudulent sale, an additional benefit; and the principal allegations of fact urged in corroboration of this story are, first, that the price agreed upon, with their approval, at the time of the sale, seven thousand dollars, was inadequate; and, second, that Charles the son, did not, on receiving his deed, turn his invalid father, his mother, and his helpless little sister into the highway, to shift for themselves. It can hardly be necessary to say that if they, John W. Bridenbacker and James D. Ferguson, had, as creditors, come into a court of equity to set up their claim under circumstances such as these, the court would receive them with small favor. Of that they were, no doubt, fully conscious, and they have sought an ingenious, though indirect mode of accomplishing the result through the assignee in bankruptcy of the estate of their brother Amos, who is, in form and in law, trustee for all of his creditors. In fact, they are the only persons who have proved debts against that estate, and they will, if no other creditors appear, enjoy all the benefits of any recovery by the assignee. They seek the assignee, they assume the burden of the litigation, they gave him their obligation for his indemnity against costs, and this suit is the result, and they are their own anxious, willing witnesses, and vigilant, active promoters of the prosecution, devoting, further, their time and industry to the procurement of evidence; and, though it is not specifically proved, there is ground for inferring that counsel are employed by them to set aside the transaction, have the sale and conveyance declared void, compel the defendant, Charles, to give up the farm, and account for and pay over all the property and the proceeds of sales, and that without allowance for what he has paid, or protection against the obligations which he has assumed.

It is insisted by the counsel for the plaintiff, the assignee in

bankruptcy, that the circumstances above alluded to, however clear it may be that Bridenbacker and James D. Ferguson were, upon their own evidence, parties to the transaction, do not bar him, as assignee for the benefit of all creditors who either have or may hereafter prove their debts; and that the misconduct or even fraud of some of the creditors of a bankrupt, is no hindrance to his proceeding to recover all that in law or equity, he, as assignee, is entitled to recover as part of the estate in which creditors are entitled to share. There is no occasion here to controvert or deny that proposition. It is sufficient to say, that the relation which Bridenbacker and James D. Ferguson bear to the transactions in question, and their conduct herein, impairs confidence in their testimony; and it is chiefly upon that testimony, contradicted in all important particulars, that the claim that there was an actual intent to defraud creditors, rests; and in view of that conduct, and of the very large contradiction by numerous witnesses who testify on the subject of inadequacy of price, it is not unreasonable to say, that the testimony of these witnesses falls under liability to large qualification, in the estimate the court should place upon its weight in this controversy.

It is in this view that I have deemed it relevant to consider the history of the transaction, the share the chief witnesses and sole creditors who have proved their debts have had therein, and their actual relation to the litigation itself, carried on at their cost and risk, and for their benefit, while they are themselves in the possession and enjoyment of the fruits of what they, after nearly three years of acquiescence and enjoyment, claim to have been a fraud. I am aware, that in the narrative I have given, I have not alluded, in detail, to the evidence, nor noticed many particulars relied upon by the plaintiff's counsel. But they have not escaped my attention, and I have contented myself with giving the results of a consideration of all the testimony, and of the degree of credit to which I deem it entitled.

Subject to these observations, I must dispose of the case as it is in form and legal effect—an endeavor by an assignee in bankruptcy to set aside a conveyance of property made by the

bankrupt, declare it void, and compel a delivery of the property and the proceeds of all that has been sold, to the plaintiff. Viewing the case solely in that aspect, my conclusions may be briefly stated.

First. It was not suggested on the argument, but it is by no means clear that the decree prayed for could be granted in a suit to which the holders of mortgages upon the farm, made by the defendant, Charles A. Ferguson, subsequently to the conveyance to him, are not parties. Surely, the mortgage to Bridenbacker, upon the proofs in the case, must, if the sale were declared fraudulent and void, fall with the conveyance. It was taken with full knowledge of all the facts, if any there be, which invalidate the sale; and, as to the other mortgage, it is difficult to see how the presence of the holder can be dispensed with, when the foundation of his title is attacked and sought to be wholly defeated. The bill does not recognize its existence, nor does it seek to recover the equity of redemption, leaving that mortgage a subsisting lien. Observations pertinent to this subject, and to the duty of the court to take the objection, though not raised by the defendants, may be found in the decision of this court in the *Florence Sewing Machine Co.* v. *The Singer Manufacturing Co.* (8 Blatchf., 113), and in cases there referred to (*Mallon* v. *Hinde*, 12 Wheat., 193; *Elmendorf* v. *Taylor*, 10 *Id.*, 152; *Coiron* v. *Millanden*, 19 How., 113, 115; *Shields* v. *Barrow*, 17 *Id.*, 130; *Greene* v. *Sisson*, 2 Curtis, C. C. R., 171), and other cases. It is, however, unnecessary to consider this point, or, in this case, to express an opinion upon it.

Second. It is unnecessary, in the view I take of the proofs, to inquire whether the assignee in bankruptcy can assail a conveyance made by the bankrupt, two years or thereabouts before the petition whereon he was adjudged bankrupt was filed, or whether the limitations prescribed in the 35th and 39th Sections of the Bankrupt Law, apply to all conveyances which the bankrupt himself could not impeach as fraudulent against creditors. I am, however, not willing to give any assent to the argument, that the assignee is in such sense the representative

of the bankrupt; that he cannot attack and set aside a conveyance on the mere ground that the bankrupt himself is bound by it. If, in another case, it should be material, that question will receive the consideration it deserves.

Third. The transaction between the defendants is assailed upon the ground of fraud, and three sources of evidence of fraud are relied upon. First, testimony claimed to warrant the inference of actually expressed intent, at the time of the conveyance, to cover the property by a sham sale, to be held by the defendant, Charles, in form, but in fact for the benefit of his father, in order that the same might be kept from his creditors. Second, testimony claimed to corroborate the other, by showing that the price was greatly inadequate; and, finally, third, testimony claimed to show continued use and possession of the property by the bankrupt after the sale.

First. Some reasons for deeming the proof to fail in establishing an expressed intention to defraud creditors may be inferred from the narrative I have above given. But, even taking the testimony of Bridenbacker and James D. Ferguson, the plaintiff's chief witnesses, to this precise point, it fails to establish it; and for reasons already suggested, I should deem it overborne by testimony in behalf of the defendant, if it were more specific. All that can justly be claimed, on this portion of the proofs, is, that Amos S. Ferguson intended to give a preference to his individual creditors, and especially to Bridenbacker, and his brother James, over persons who might charge him with liability for the debts of the Towing Company, and that the sale to Charles was made for that purpose, and with intent to appropriate all the property of the bankrupt to such individual debts. If this transaction had taken place within four months of the filing of the petition upon which Amos S. Ferguson was adjudged a bankrupt, it would have fallen under the condemnation contained in the 35th Section of the Bankrupt Law. But, unless fraudulent upon other grounds than because it was made for that purpose, and with that intent, the assignee cannot impeach it or recover. This subject has been discussed in *Collins* v. *Gray*, 4 N. B. R.

Second. In respect to the alleged inadequacy of price, the testimony is greatly conflicting. But the opinions expressed by Bridenbacker and James D. Ferguson as witnesses, is impeached by their own account of the transaction. If the farm was, in fact, deemed of greater value, at the time, than the price Charles agreed to pay, there was no motive for the undervaluation. It would have been easy, and according to what they say was understood should be done, to have Charles give notes for the full amount due to them, or for which they were liable, and so carry into effect what they say was actually agreed, and, at the same time, avoid the appearance of evil. Besides, they stood by, assenting to the transaction, without a suggestion that the price was not the full value of the farm, subject to the inchoate right of dower, or that the personal property was worth more than the appraisal then made, and, in part at least, made by Bridenbacker himself.

Bridenbacker and James D. Ferguson, as witnesses herein, and eleven witnesses whom they have produced, and who swear almost in their words, estimate the gross value of the farm at twelve thousand dollars, a price plainly speculative, and based upon a supposed practicability of selling the land, or parts of it, for building lots, without showing that there is any demand for such building lots at that distance from the city of Utica, and notwithstanding there are very many farms nearer to the city, recently sold at much less prices than even the estimate of the defendant's witnesses. If it were conceded that the industry and zeal of Bridenbacker and Ferguson had succeeded in finding persons who will say that the land is worth more than was paid for it, or that they would give more, this is by no means conclusive. This is no uncommon state of things. What is more frequent, after a sale of valuable property, than the finding of some prepared to say they would have given more? Looking at the circumstances already alluded to, and the very large contradiction of those who give the larger estimates, I am constrained to say, that there was no such inadequacy of price as warrants the inference of fraud in the sale.

Third. As to the continued residence of Amos S. Ferguson

with his son. The proof satisfactorily shows he was an invalid, and that Charles did, in fact, take charge of the farm and direct its cultivation, hiring and paying the laborers, and providing for the support of the family, aided, no doubt, by such assistance as his father was able to render, and, to some small degree, by contributions of his sister, from her earnings. This is in perfect consistency with good faith and honesty in the transaction, and, coupled with the positive testimony of both Charles and his father, to the absence of any fraudulent design, the relations of the son to such a father, and the son's obvious need of his mother's assistance, at least, in keeping the house, repels any presumption or inference arising from the father's continued residence and occasional assistance on the farm. I am disposed to judge much more favorably of the reasonable, just, and fair intent of the defendant Charles, from what he did in this respect, than I should be if he had turned his father and mother out of the house.

My conclusion hereupon is, that the bill of complaint should be dismissed, with costs.

William Kernan, Jr., for the plaintiff.

E. J. Richardson, for the defendant.

UNITED STATES CIRCUIT COURT—N. D. NEW YORK

The District Court in bankruptcy has power to take the administration of the entire estate and ascertain and liquidate liens thereon, and to restrain the holder of a mortgage or other lien, from proceeding in any suit to enforce such lien.

But when no advantage can result to the estate of the bankrupt, and it appears, without contradiction, that the equity of redemption of a mortgage is of no value, there is no reason why the court should interfere.

By electing to pursue the mortgaged premises, the mortgagees deprived themselves of any right to prove their debt in bankruptcy for the deficiency.

In re The Iron Mountain Company of Lake Champlain.*

Woodruff, J.—The bankrupt seeks, by petition of review,

* 9 Blatchford, 321.

to reverse an order of the District Court, which, by the dissolution of an injunction, permits the respondent, Samuel C. Smith, to continue a suit brought in the State court for the foreclosure of a mortgage upon certain lands of the bankrupt, which suit was commenced after the filing of the petition, wherein the Iron Mountain Company was adjudged bankrupt, and after the appointment of an assignee, and the conveyance to him of all the estate of the bankrupt. It appeared, by uncontradicted evidence, that the mortgaged premises were worth less than one-half the amount of the mortgage, so that it was quite clear that the equity of redemption is of no value whatever. There was no proof that the mortgage is not in all respects valid, and it was given long before the bankruptcy of the company.

There is no doubt whatever of the power of the District Court in bankruptcy to take the administration of the entire estate, and ascertain and liquidate liens thereon, and to restrain the holder of a mortgage or other lien from proceeding in any suit to enforce such lien; and, when the value of the property exceeds the amount secured by such mortgage or lien, it will, in general, be proper to do so, in order to preserve to the assignee his right, secured by the 20th Section of the Bankrupt Law, to receive the excess in value and release the right of redemption, or to sell the property subject to the mortgage, or to invoke the power of the court to first liquidate and settle the amount of the lien. So it will be proper to restrain the proceeding in any other court, where the amount or the validity of the lien is in doubt. This may often be necessary to the full protection of the general creditors, who are entitled to such protection in the court in bankruptcy, where they are to look for the fund to be distributed to them. In all such cases it would be the duty of the assignee to apply to the court in bankruptcy, to assist him in bringing all the assets into that court, to be applied and disposed of according to the rights and interests of all concerned, whether holders of liens or general creditors. But where no advantage can result to the estate of the bankrupt, I see no reason why the court should interfere

when neither the assignee nor any creditor invokes such interference, and it appears, without contradiction, that the equity of redemption is of no value. There is no excess of value to be paid to the assignee on his releasing the right of redemption. There is nothing to be sold subject to the mortgage, which will yield anything; and any action of the District Court for the liquidation and settlement of the amount of the lien and for the sale of the property to satisfy it, would be a mere expense to the estate, producing nothing. Under these circumstances the court may, I think, properly exercise a discretion on the subject, and may decline interference. The case should be clear, and the proof that nothing can be saved to the estate should be satisfactory; and if the court can see that any prejudice to the interests of creditors may happen, it should not permit those interests to be put at hazard by a proceeding to which the general creditors are not parties, and in respect to which they have no protection but through the proceedings in bankruptcy.

Upon the uncontradicted facts in this case, nothing can be gained, and expenses chargeable upon the estate would be incurred, by any interference in the matter. Whether the property, when sold in foreclosure, shall produce one-half, or only one-fourth of the amount of the mortgage, is not of the least moment. The claimants of the lien, by electing to pursue the mortgaged premises, will deprive themselves of any right to prove their debt in bankruptcy, for the deficiency (twenty dollars), and in that view, it may be greatly for the interest of the general creditors to permit such election to be carried into effect, and thereby enhance the dividends to be made to them.

The order of the District Court was a proper one and must be affirmed.

William C. Holbrook, for the bankrupt.

C. F. Ostrander and *S. M. Ostrander*, for Smith.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

A debtor's property was seized by the sheriff by virtue of an attachment issued out of a State court. After the levy of the attachment, two suits were commenced in a State court, judgment obtained, executions issued and delivered to the sheriff. After such levy the debtor filed his petition, and was duly adjudged a bankrupt.

The judgment creditors moved for an order directing the payment of the judgments in full on the ground that, by the Bankrupt Act, the attachment was discharged, and there having been a *bona fide* levy under the executions, before the filing of the petition, the lien of the executions is saved by the act.

Held, that the provisions of the act do not indicate any intention to improve the condition of any creditor, or create new rights.

That, in the present case all the right which the judgment creditor acquired, was by a levy in property already subject to an attachment to its full value. Such a levy gave the judgment creditor no security, and does not entitle him to apply to this court for payment of his judgment in full.

In re JULIUS KLANCKE.

BENEDICT, J.—On the 6th of November, 1869, the personal property of Julius Klancke was seized by the sheriff, by virtue of an attachment issued under the laws of the State of New York.

After the levy of the attachment, two suits were commenced in the Marine Court of the City of New York, against the bankrupt, in which judgments were obtained, and executions issued and delivered to the sheriff. After such levy, the debtor filed his petition in bankruptcy, under which he has been declared bankrupt, and his property having been converted into money by the trustee, is now in his hands for distribution.

The gross amount of the estate is one thousand six hundred and sixty-eight dollars and eighty-seven cents, without deducting expenses. The amount of the judgments in the Marine Court, is one thousand and thirty-seven dollars and eighty-eight cents. The amount of the prior attachment was two thousand seven hundred and ten dollars and seventy-five cents. The estate having been converted into cash, by consent of parties, without prejudice to the rights of the judgment creditors and the attaching creditor, and subject to the order of the court, the judgment creditors now move for an order, directing the

payment of the judgments in full, in preference to any other creditors, upon the ground that, by the Bankruptcy Act, the attachment was discharged; and there having been a *bona fide* levy under the executions, before the filing of the petition, the lien of the executions is saved by the act, and the judgment creditors are accordingly entitled to be paid in full. I cannot assent to this view of the effect of the Bankruptcy Act, in a case like the present. The provisions of the act for preserving existing securities, certainly do not indicate any intention to improve the condition of any creditor, or create new rights. The most that could be said is what was said in earlier cases, arising under the act; namely, that any right of priority, lawfully acquired by a judgment creditor, by a valid levy made prior to the filing of the petition in bankruptcy, would be preserved in proceedings under the act. In the present case, all the right which the judgment creditor had acquired, was by a levy on property already subject to an attachment, to its full value. Such a levy gave the judgment creditor no security, and does not entitle him to apply to this court for a payment of his judgment in full, out of the proceeds of the estate. In this view of the law, it is unnecessary to consider the effect of the evidence relied upon, to show that the insolvency of the bankrupt was known to the judgment creditor, at the time of obtaining his judgment. My determination is based upon the assumption, that the prior attachment was a *bona fide* proceeding, instituted in good faith, to collect a debt due.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

The assignee of B brought suit against D and E to recover the value of certain personal property which had been disposed of by the defendants. Against D, the claim was made on the ground that he had received certain goods which were transferred to him by a warehouse receipt.

As against E, the claim was, that, knowing the insolvency of B, he received under general assignment to himself all the remaining property of B.

The evidence showed that D transferred the property in his possession under the warehouse receipt to E, as the general assignee.

Jones, Assignee, v. Kinney et al.

Held, that D was not liable as transferee of the warehouse receipt, but only for money received from E, the assignee, as a preferred creditor.

That as E was not a creditor of the bankrupt, and as he had distributed some of the property to the preferred creditors under the general assignment, before the commencement of proceedings in bankruptcy, he was not chargeable with the value of any property turned over to lawful creditors of the bankrupt, but was liable for the balance only which shall appear to be in his hands after a proper accounting with the assignee in bankruptcy.

CHARLES JONES, *Assignee of* WM. M. RICE *v.* FRANK KINNEY AND C. C. WILSON *et al.*

BENEDICT, J.—This action is brought by the assignee in bankruptcy of one William M. Rice, to recover of the firm of C. C. Wilson & Co., Frank Kinney, and others, the value of certain personal property of Rice, the bankrupt, which has been disposed of by the defendants. As against the defendants C. C. Wilson & Co., the claim is that, with a knowledge of the insolvency of Rice, for the purpose of obtaining a preference, they received some two thousand eight hundred dollars worth of goods, which were transferred to them by a warehouse receipt, for the value of which they thereby became liable to the plaintiff. As against Frank Kinney, the only other defendant who has here interposed a defense, the claim is, that, knowing the insolvency of Rice, he received, under general assignment to himself, all the remaining property of the bankrupt, in which assignment the defendants C. C. Wilson & Co. and others were made preferred creditors, whereby he became liable to the plaintiff for the value of all the property so transferred to him.

In regard to the claim against C. C. Wilson & Co., I do not think it can be sustained upon the ground taken by the plaintiff, that they became possessed of the property described in the warehouse receipt. As I understand the evidence, although the property referred to was at one time in their possession under the warehouse receipt, it was shortly afterwards surrendered by them to the general assignee, Kinney, and by him disposed of as assignee. C. C. Wilson & Co. are not, therefore, liable as transferees of the warehouse receipt, but they are liable for the money which they received from Kinney as preferred creditors.

This amount the evidence shows to have been five hundred and fifty dollars, and for that sum the plaintiff is entitled to judgment against them.

In regard to holding Kinney, the general assignee, liable for the value of all the property which he originally received under the assignment, inasmuch as the evidence shows that he was not a creditor of the bankrupt, and that before objection made on the part of any creditor, although all the creditors but two were notified of the assignment, and before any proceedings in bankruptcy, he had distributed some of the property *in specie* or in proceeds to the preferred creditors, I am of the opinion that he is not chargeable with the value of any property which shall be shown to have been, in good faith, turned over to lawful creditors of the bankrupt, and is entitled to be credited with the payments to lawful creditors made by him in accordance with the terms of the assignment; but he is liable for the balance which shall appear to be in his hands upon a proper accounting with the assignee in bankruptcy, after deducting such payments. As against him, therefore, the decision will be for an accounting, and that the judgment be entered for the balance found due, after giving the credits allowed by this opinion, and letting stand all questions as to his disbursements and other expenses until the coming in of the Master's report, before whom evidence in respect to the same may be given on either side.

UNITED STATES CIRCUIT COURT—MISSOURI.

Under a declaration upon the 35th Section of the Bankrupt Act, alleging that the bankrupt did "transfer, assign, and convey," etc., to the defendant, the plaintiff is not limited on the trial to the proof of a technical assignment under the State insolvent laws.

A judgment will not be reversed because papers recognized on the trial in evidence were not *formally* read. Under the circumstances stated in the opinion, it was held that the District Court did not err in allowing a deposition taken and filed by one party to be read in evidence by the other.

Dates fixed by the records of the court may be stated to the jury as facts.

The court will look at the entire charge to the jury in order to ascertain whether the law was, upon the whole, fairly presented to them.

Andrews v. Graves.

Construction of the 35th Section of the Bankrupt Act; and the ingredients of a right of the assignee to recover thereunder, stated and commented on by Treat, District Judge.

[BEFORE DILLON AND TREAT, J. J.]

ANDREWS *v.* GRAVES.*

WRIT of error to the District Court for the Western District. The action was brought by the assignee of Lawrence, against the defendant, under the 35th Section of the Bankrupt Act. The plaintiff recovered, and the defendant sued out the writ of error, which now brings the cause before this court.

The counsel below seems to have supposed the time material, and that the cause of action was limited to a technical assignment, as under the State statute, and consequently no other evidence was admissible as to any other form of an alleged fraudulent transfer or conveyance, or as to any such transfer or conveyance at a different time from that stated in the declaration. The declaration is so framed as to cover any fraudulent transfer, assignment, or conveyance during the six months prior to the filing of the petition in bankruptcy. Hence all the errors assigned which are based on the incorrect hypothesis of counsel below as to the cause of action, disappear. It is said there is no evidence that Andrews was adjudged bankrupt, or the plaintiff appointed assignee. The declaration avers these facts, and the adjudication was made by the court which tried the case; and frequent reference is made at every stage of the case to the records of the court in the bankrupt proceeding, showing that these records were produced and recognized as evidence. No objection was made below that they were not *formally* read or offered in evidence; but all parties treated them as before the court and jury.

It appears that the defendant caused the deposition of Higgins to be taken on notice, before Register Lindenbower, and that at the time and place designated both parties appeared by counsel and examined, cross-examined, and re-examined the witnesses at great length; that said deposition was duly filed

* 1 Dillon, 108.

in the cause, and that defendant moved to strike the same from the files, on the grounds set out in the written motion therefor; and subsequently objected to the plaintiff's reading the depositions for reasons stated. The grounds thus stated, except in one particular, *debars* the record, and for aught known to this court, the motion and objections were overruled, because it was apparent to the court that they had no foundation in fact. It does appear that the deposition was taken before the Register at the instance of the defendant himself, and with the assent of the plaintiff; that, after being duly certified, it was placed on file in the case. In *Yeaton* v. *Fry*, 5 Cranch, 335, one of the errors assigned was that the plaintiff was permitted to read in evidence depositions informally taken by the defendant under a commission, and the Supreme Court held that there was no error committed, Chief Justice Marshall delivering the opinion. That case does not expressly determine all the points here presented, but it decides that when depositions are not taken *ex parte* or *de bene esse*, under the act of 1789, or both parties appear and examine and cross-examine, and the depositions are subsequently placed on file, the party at whose instance they were taken cannot object to their being read by the opposite party on the ground of any irregularity or informality. Having taken a deposition under the circumstances named, he cannot except thereto, nor cause the same to be suppressed. The officer before whom taken ought to cause the same to be transmitted to the court, for the benefit of all concerned, and once on file, the defendant could not suppress or withdraw it. Although a Register has no authority to take such a deposition, yet he has full authority to administer oaths; and when, by the assent of parties he has taken such a deposition to be used as evidence therein, to which the defendant causing the same to be taken cannot object, the irregularity was defendant's, to which the plaintiff might have excepted, not the defendant.

We do not understand the record to show that there was any objection to the use of the deposition, on account of the incompetency of the officer before whom it was taken; nor does the objection seem to have been made that one party could not

use the deposition taken by another, had it been properly certified, returned, and filed. But there having been an appearance before the officer of both parties by counsel, and a full examination and cross-examination of the witness, and no objection having been made that the witness was present in court, and the course pursued being conformable to the usual practice in the State, we unite in holding that the court did not err in allowing the deposition to be read, without now deciding that one party has in all cases an absolute right to use depositions taken by his adversary.

As the records of the court before the judge fixed the precise date at which Andrews' petition in bankruptcy was filed, and were absolute verity, no error was committed in stating that date to the jury.

To determine whether there was error in charging the jury it is necessary to look to the whole charge, to ascertain whether one part of it is not qualified by another, and thus the law fairly presented. The definition of insolvency in this case (the defendant being a merchant) was not only correct, but the allusion to another provision of that act, as illustrative of the reason of the rule, was unobjectionable.

All through the charge the court endeavored to enforce upon the jury that it was their exclusive province to weigh the testimony, and determine what it established. Their attention was called to the testimony bearing upon certain points to be ascertained, and the rules of law in reference thereto stated. If the charge were to be considered as to each sentence or point, dissevered from the other sentences or points in the complex problem, room might exist for sharp criticism as to successive details; but the question for review is, whether the law governing the case was fairly and correctly stated, and not whether another and different mode of presenting them would not have been more satisfactory to one or the other of the parties litigant.

The law on which is based the plaintiff's right to recover, requires these facts to be proved:

First. The vendor was insolvent, or in contemplation of insolvency.

Second. The vendee had reasonable cause to believe such to be the condition of the vendor.

Third. The sale was made by the vendor with a view to contravene the provisions of the Bankrupt Act.

Fourth. The vendee had good reason to believe such to be the view or intent of the insolvent vendor in making the sale. *Babitt* v. *Walbrun & Co.*, 4 N. B. R., 121, *quarto.*

Hence, as to the vendor, it must be shown that he was insolvent, etc., and that he made the sale with the view named; and on the part of the vendee, that he had reasonable cause to believe the *status* of the vendor to be as charged, and his purpose or intent to be, in making the sale, a contravention of the act.

In ascertaining the alleged fact of insolvency, it was proper to charge the jury in such a way as to give them a clear view of the legal meaning of the term. That was done. Not only was a correct definition of insolvency given, as applicable to a merchant, but it was illustrated by reference to another provision of the act. That illustration, so far from being ground of error, was quite appropriate, in order that the jury might have a clear understanding of the proposition stated. So it was proper to direct the attention of the jury to the distinction between "reasonable *cause* to believe" and "actual belief"; between willfully shutting the eyes to demonstrative facts and circumstances, and their obvious existence. In that respect the charge was more favorable to the defendant than a stricter statement of the rule might have justified.

The statute declares what shall be *prima facie* evidence of a fraudulent transfer, and when such a *prima facie* case is made out and no explanatory evidence is offered, it is unnecessary for the court to enter upon minute or elaborate distinctions as to the force and effect thereof. The case should be stated in the light of the law as applicable to the testimony produced, and not with reference to supposed or imaginary states of proofs possible to be adduced in some other cause. The jury are to be instructed and not confused; and there is no need of going beyond the legal requirements of the case

presented. In the light of the testimony, the court was called upon to define the rules of law applicable thereto, and did so without repeating each element of the problem as it passed to the next in logical order.

The testimony sufficiently established the insolvency of the vendor, and reasonable cause in the vendee to believe the vendor insolvent. It also showed that the sale was made out of the ordinary course of business, and consequently there was *prima facie* evidence of fraud—fraud on the part of the vendor, in which the defendant was directly participating. If the law declares a sale under given circumstances, *prima facie* evidence of fraud, it is *prima facie* evidence to all concerned—to the vendee as well as to the vendor. It is difficult to perceive how, when *prima facie* evidence of a fact is presented, a person has not reasonable cause to believe the fact to exist, or, in the language of the decisions " to be put upon inquiry."

Dealing with the case as it thus stands, the court below brought with sufficient clearness to the minds of the jury, the legal rules by which their action was to be governed, and guardedly stated that it was exclusively for them to give, even to the *prima facie* evidence, such weight as they might deem proper.

In referring to the testimony concerning the mortgage on the property of the bankrupt's wife, and the manner in which, by the contrivance of the defendant and the bankrupt conjoined, that mortgage was paid off at the expense of the creditors, the court used the strong language with which the law characterizes such a transaction. Certainly, there is no assignable error on that ground. If a father-in-law, when his son-in-law is known by him to be insolvent, and within a few days of his voluntary application to be adjudged a bankrupt, buys, out of the usual course of trade, a large, if not the largest portion of the insolvent's property, and gives notes payable at long dates, and then cashes the notes and pays to his own son, as mortgagee, the money thus furnished, in discharge of a mortgage on the property of his daughter, who is the wife of the bankrupt son-in-law, it is not improper to say the law frowns on such contriv-

ances for using the bankrupt's means to the detriment of his honest creditors. That transaction obviously was the transfer of the bankrupt's property to his wife in fraud of his creditors, through the agency of the wife's father, for the benefit of herself, and of his son, the mortgagee.

The defect in the declaration was cured by the verdict under the statute of Jeofails.

Dillon, Circuit Judge, concurs.

UNITED STATES CIRCUIT COURT—MISSOURI.

Creditors who receive an illegal preference are liable to the assignee of the bankrupt; and the intent of the debtor to give, and of the creditor to secure an unauthorized preference, may be shown by circumstances. Facts establishing an illegal preference stated.

[Before DILLON & KREKEL, J.J.]

GIDDINGS, *Assignee*, *v.* DODD, BROWN & Co.*

THIS cause comes before the court on a writ of error, to the District Court for the Eastern District. Giddings, the bankrupt, in October, 1869, was a country merchant, owing six thousand dollars, and having assets to the amount of only two thousand four hundred dollars.

In that month he sold his entire stock of goods to one Pendleton, for eighteen hundred dollars, who executed two notes to Giddings therefor, one for one thousand three hundred and seventy-three dollars, the other for three hundred and ninety-two dollars. In January, 1870, Dodd, Brown & Co., to whom Giddings owed one thousand four hundred dollars, on a business note long past due, having failed to obtain payment or security from Giddings, commenced an attachment suit against him on the ground that he had made a *fraudulent* disposition of his property, and attached the goods sold to Pendleton, and garnished him with respect to the note he had executed to Giddings. The note for three hundred and ninety-two

* 1 Dillon, 115.

dollars had been turned out by Giddings to another creditor. Shortly after an attachment was served; this arrangement was made at the instance of Pendleton, to wit: Pendleton was to procure Giddings to agree to turn out the note for one thousand three hundred and seventy-three dollars, which he held against Pendleton, to Dodd, Brown & Co. Pendleton was entrusted by Giddings with this note. Defendants agreed to receive it in payment *pro tanto*, and did so, and surrendered it cancelled to Pendleton, on receiving, in substitution for it, his indorsed and secured note for the same amount, and payable at the same time, and the one thousand three hundred and seventy-three dollars was indorsed by the defendants as a credit on their debt against Giddings, and the attachment released. Within four months thereafter, Giddings was forced into bankruptcy, and the plaintiff, as his assignee, brings this action under the 35th Section of the Bankrupt Act, to recover the sum of one thousand three hundred and seventy-three dollars, on the ground that it was paid and received as a preference, under circumstances which made it void, against the other creditors of the bankrupt.

In the District Court a jury was waived and the plaintiff recovered. The defendants sue out a writ of error to this court, and complain of the legal propositions which the District Court held to be applicable to the case.

Among other things the court (Treat, J.) declared the law applicable to the case as follows:

"If a debtor is insolvent, a payment by him to one of his creditors is, by presumption of law, made with a view to give a preference, and consequently is a fraud upon the provisions of the Bankrupt Act, inasmuch as the natural and necessary consequence is the payment of one creditor without the means of like payment to the other creditors, whereby the equality among creditors of an insolvent, intended to be secured by the act, is defeated. Hence, if Giddings was insolvent, and the defendants received payment from him, having at the time reasonable cause to believe him insolvent, the payment was made with a view to give him a preference, and

in fraud of the provisions of the act, and the defendants had reasonable cause to believe such to be the debtor's intent. The same rule of law obtains whether the debtor made the payment under such circumstances, with or without pressure from the creditor—willingly or otherwise."

Rankin & Hayden, for the plaintiffs in error.

Thomas A. Russell, for the defendant in error.

DILLON, C. J.—The 35th Section of the Bankrupt Act makes payments to creditors in violation of its provisions void, and gives the assignee the right to recover the amount of the illegal preference.

The only questions which can now be reviewed, are those arising in the declaration of the law above mentioned.

It correctly states the elements which must concur to invalidate a payment made with a view to give a preference.

But it is objected by the defendants that the rule of law declared may be absolutely correct, yet it was inapplicable to the circumstances of this case, since the evidence negatived any intent on the part of Giddings to give a preference, as he was passive in the matter, or acted only at the instance of Pendleton, and the argument is that if *Giddings* had no intent to give a preference then it is not possible that the defendants could have "had reasonable cause to believe that such payment was made (by him) in fraud of the provisions of the Bankrupt Act."

But it is undeniable that Giddings did consent to, and did turn out the note against Pendleton to the defendants. He owed, in all, about six thousand dollars, and the note he thus gave in payment to the defendants constituted the bulk of his available assets. What could he have meant but to give them a preference? By the payment to them the defendants secured a preference, the lion's share of his assets; and this too, when they knew he was insolvent, and had made acts which are acts of bankruptcy, grounds for their attachment against him.

If, under such circumstances, these defendants can retain the advantage they sought to derive from the attachment, manifestly

the purpose of the Bankrupt Act, which is intended to prevent preferences and put all general creditors upon an equal footing, would be defeated.

Krekel, J. concurs.

SUPREME COURT—PENNSYLVANIA.

The assignment of the bankrupt's property to the assignee in bankruptcy, no matter when made, by the construction of the 14th Section of the Bankrupt Act of 1867, takes effect, by operation of law, as if it had been made at the commencement of proceedings, or on the day of filing the petition. The assignment is such a notorious judicial act that all the world is bound to take notice of it.

Payment to a bankrupt *bona fide* made and without actual notice, after the commencement of proceedings, is not valid.

An assignment only transfers the property which the bankrupt then had excepting, of course, fraudulent conveyances made by him previously to the commencement of bankruptcy proceedings.

The earnings and acquisitions of the bankrupt subsequent to the filing of the petition belong to him subject to his eventual discharge: if he does not succeed in procuring that, they remain liable to execution or attachment by his former creditors.

The *onus* is on the assignee to show, affirmatively, that money deposited in a bank by the bankrupt after the petition was filed was his (the bankrupt's) property at the time the assignment by relation took effect.

MAYS *et al.*, *Assignees of* BORN *v.* THE MANUFACTURERS' NATIONAL BANK OF PHILADELPHIA.*

THIS was an action of assumpsit brought by Samuel V. Mays and Charles W. Horner, assignees in bankruptcy of August Born, against The Manufacturers' National Bank of Philadelphia.

On the 31st of January, 1868, a petition by a creditor was filed in the District Court of the United States for the Eastern District of Pennsylvania, asking that Born be declared a bankrupt. In an issue, a jury found that he was a bankrupt, and on the 26th of February, 1868, he was so adjudged. Due publication of the adjudication was made in accordance with the order of the court; the plaintiffs were appointed assignees on

* 64 Penn. Rep., 74; 14 Smith.

the 28th of March. This case was tried February 2d, 1869, before Greenbank, J., when, in addition to the above facts, the plaintiffs gave in evidence the bank-book of Born, in which the first entry was—"1868, February 6th, Balance from old book, $409.12." There were other entries of credit up to April 1st, which, with the above balance, amounted on that day to two thousand six hundred and sixteen dollars and forty-two cents, against which Born was charged with a number of checks, commencing February 6th and ending April 4th, when there was in his favor a balance of twenty-nine dollars. The checks were given in evidence by the defendant. It was not denied on the trial, that these checks were paid by the bank in good faith, without actual notice or knowledge of the proceedings in bankruptcy against Born.

The plaintiffs submitted a number of points, on which they asked the court to charge the jury. The question raised by them was, whether the payments, having been made by the bank on checks of Born after the commencement of the proceedings in bankruptcy, were valid. Judge Greenbank refused all the plaintiff's points, and charged:

"The question in this case is one of law alone, the facts being undisputed. The point has been decided by this court in banc, on the hearing of the rule for judgment for want of a sufficient affidavit of defense, that the bank not having knowledge or actual notice of the proceedings in bankruptcy of August Born, is not liable to the assignees in bankruptcy for the money drawn out by him prior to notice.

"I therefore instruct you, that your verdict may be for the plaintiffs for the balance remaining due, after giving the defendant credit for the amount of the checks given in evidence, drawn by August Born, to wit, the sum of twenty-nine dollars, and I decline generally to charge as requested by the plaintiffs."

The verdict was for the plaintiffs for twenty-nine dollars. They took a writ of error, and assigned for error the answer to their points and the charge of the court. C. W. Horner, for plaintiffs in error, referred to Bankrupt Act of March 2, 1867,

Sections 14, 27, 28, 35, 39, 42, 44. "Acts of Congress," etc., 159 *et seq.*

The proceedings in bankruptcy are notice to all the world; the assignment relates to the commencement of the proceedings, and payments to the bankrupt after that time are illegal. *Ex parte* Foster, 2 Story, 158; *Carr* v. *Gale*, 3 Woodb. & M., 67; *Bramwell* v. *Eglinton*, Law Rep., 1 Q. B., 494; *Exley* v. *Inglis*, *Id.*, 3 Exch., 247; *Lis pendens* is notice; *Taylor* v. *Carryl*, 12 Harris, 261.

A. H. Smith, for defendants in error, referred to Bankrupt Act, *supra*. Such property only as bankrupt has at the time of the assignment, or has been fraudulently conveyed, should pass to the assignees. *Dormer* v. *Brackett* (United States Dist. Court, Vt.) 5 Law Rep., 392. Only the estate that the bankrupt had at the commencement of the proceedings, not that afterwards acquired, should pass. *In re* Patterson, 1 N. B. R., 125; *in re* Rosenfield, 1 N. B. R., 319; Grant's Case, 2 Story, C. C. R., 312.

Sharswood, J.—The counsel for the parties, with all their research, have not been able to produce any decision upon the question, whether, where the debtor of a bankrupt, in good faith and without knowledge or notice of the proceedings against him, pays him a debt, he can be compelled to pay it over again to the assignee. The reason may be that the language of all Bankrupt Laws previous to the Act of Congress of March 2d, 1867, was such as to preclude the question from arising. In England, by the statute 13 Eliz., C. 7, the property of the bankrupt vested in the commissioners from the time of an act of bankruptcy committed; and payments made by a debtor to a bankrupt, after a secret act of bankruptcy, would under the statute have been void. The injustice of this relation back was so apparent, that Parliament, by the statute 1 Jac. 1, C. 14, made such payments, until notice of the act of bankruptcy, good; but still left payments, after commission issued, as they stood under the statute of Elizabeth. To the present time the law in England rests on the same basis, that all contracts, conveyances, and dealings to and with a bank-

rupt, in good faith and without notice, before the filing of the petition, are valid; otherwise, after the filing. Eden on Bankruptcy, 258; Stat. 4 Geo. IV., C. 16; 12 and 13 Vict., C. 106. By the Act of Congress of April 4, 1800, Section 13 (1 Story's Laws, 737), the commissioners were empowered to assign all the debts due to the bankrupt, which assignment should vest the property and right thereof in the assignee: "Provided, that where a debtor shall have *bona fide* paid his debts to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees." This just and liberal provision was not contained in the Act of Congress of August 19th, 1841 (5 Story's Laws, 28, 29), but it declared "that all dealings and transactions by and with any bankrupt, *bona fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act: Provided, that the other party to any such dealings and transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act."

The Act of Congress of March 2, 1867, has no express provision on the subject.

The case is necessarily left to the legal effect of the assignment provided by the act. The 14th Section enacts "that as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the Register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title of all such property and estate, both real and personal, shall vest in said assignee." The only and natural construction of these words is, that the assignment, no matter when made, shall take effect by operation of law, as if it had been made at the commencement of the proceedings, or on the day of filing the petition. It is undoubtedly well settled that of such an assignment by operation of law the whole world is bound to take notice:

Hitchcox v. *Sedgwick*, 2 Vernon, 156; where it was said that there was a difference where a man had divested himself of his estate by his own act, and where it was taken out of him by Act of Parliament, whereunto all persons are supposed to be parties, and are concluded by it. *Callet* v. *De Gols*, Cas. Temp., Talbot, 65. The same principle was applied by this court to the case of an insolvent debtor, under the Act of March 26th, 1814 (6 Smith's Laws, 195), which provided that "the trustee or trustees shall be deemed vested with all the estate of such debtor at the time of his or their appointment." "This divestment of his debt," said Duncan, J., in *Wickersham* v. *Nicholson*, 14 S. & R., 118, "was by positive law, and the assignment, a notorious judicial act, of which all the world was bound to take notice. It is constructive legal notice, and as binding to every intent as actual notice to the individual." It was accordingly decided in that case that a payment to the insolvent, the day after his assignment and discharge, by one who had not actual notice of it, was not valid. We are compelled to apply this same principle to the case of a payment to a bankrupt *bona fide* made, and without actual notice, after the commencement of the proceedings—namely, the filing of the petition, to which time, by the express provision of the Act of Congress, the assignment relates.

It must be admitted that this is an unjust and cruel law, and the effect of it may be to make bankrupts of honest and solvent men, who are only desirous of fulfilling their legal obligations. That all the world has notice of a transfer by operation of law in proceedings in bankruptcy, is a mere fiction, not true in reality, whatever care the law may take to give public notice through newspapers. All men cannot afford to take all the newspapers, and if they did, have not time to read all the advertisements. Life is too short, and other cares too pressing for that. The attention of Congress ought surely to be called to this subject, and some suitable provision made to protect those who deal honestly, in good faith, and without notice, with bankrupts.

There is, however, another important question which arises

in this record. The proceedings in bankruptcy against August Born were commenced by filing the petition January 31st, 1868, and he was adjudicated a bankrupt February 26th, 1868. His bank account with the defendant below, which was all the evidence produced to charge them with the receipt and possession of any of his property, showed a balance from old book under date of February 6th, 1868, and all the deposits made by him were subsequent to that date. Now, if we give the fullest effect to the relation of the assignment to the commencement of the proceedings, it must be held to operate in the same manner as if it had been then made. It follows, logically, that it only transfers the property which the bankrupt then had. Of course, we do not speak of fraudulent conveyances made by him previously. This is not only the literal construction of the act but accords with its spirit and policy. It is the most humane and liberal interpretation, that the earnings and acquisitions of the bankrupt subsequent to the commencement of the proceedings shall be his own, subject to his eventual discharge. If he does not succeed in procuring that, they remain liable to execution or attachment by his former creditors. It is certainly good policy to hold out encouragement to continued effort and industry. Besides, if this is not the date of the transfer, what is? The adjudication or the discharge? A considerable period may elapse between the filing of the petition and either of these. If his acquisitions in the meantime are in any event to pass to his assignees, he will be likely to fold his hands in inactivity, content with the allowance made him by the law. It is true, that by the 16th Section debts provable are those due at the time of the adjudication, but it is also true, that by the 32d Section the certificate of discharge is expressed to be "from all debts and claims, which by said act are made provable against his estate, and which existed on the day of , on which day the petition for adjudication was filed." It would rather seem to follow that the adjudication was also meant to relate to the day of filing the petition, otherwise it is not easy to reconcile the provisions. *In re* Charles G. Patterson, a bankrupt, in the District Court

of the United States, for the Southern District of New York, 1 N. B. R., 125, Judge Blatchford, in an able and elaborate opinion, adopts and vindicates this construction of the Act of Congress. "The intent and purport of this provision" (Section 14), says he, "is that the property which was the property of the bankrupt at the commencement of the proceedings in bankruptcy, and no other property, shall vest in the assignee, and shall vest in him as of the time of the commencement of such proceedings, no matter when the assignment to the assignee is actually executed. It does not mean that the property, which is the property of the bankrupt at the time the assignment is executed, and also the property which was his property at the time of the commencement of proceedings, shall pass to the assignee." He accordingly decided, that a bankrupt cannot be examined as to property acquired, or business done after the date of filing the petition. And this decision was followed by Judge Field, in the District Court of the United States, for New Jersey, *in re* Isaac Rosenfield, Jr., 1 N. B. R., 319.

There was no evidence adduced in the court below to show that the balance in the bank, February 6th, 1868, or the subsequent deposits, belonged to August Born, the bankrupt, on the 31st January, 1868, the day the petition was filed. They may have been given to him by friends, or bequeathed to him by will, or acquired by his own industry after that date. The *onus* was certainly on the plaintiffs below, to show affirmatively that they were his property at the time the assignment by relation took effect. They failed entirely to do this, and there was consequently no evidence for the jury to charge the defendants even with the balance which was found by the verdict.

Judgment affirmed.

SUPREME COURT—MASSACHUSETTS.

In the provision of the Bankrupt Act of 1867, Chapter 176, Section 33, excepting from the effect of a bankrupt's discharge, debts created by him while acting in any "fiduciary character," does not include the obligation of a creditor, to whom the debtor delivered property with directions to sell it, and apply in satisfaction of the debts so much of the proceeds as might be necessary for the purpose, to pay over to the debtor a balance of the proceeds of the sale remaining after such satisfaction; but, *it seems*, implies a fiduciary relation existing previously to or independently of the particular transaction from which the excepted debt arises.

DENNIS CRONAN *v.* AMANDA C. COTTING.*

CONTRACT for money had and received, to recover the balance of the proceeds of accepted bills of exchange delivered by the plaintiff to the defendant, with directions to collect them, and apply to the payment of debts owing from him to the estate of her husband, of which she was administratrix, so much of their proceeds as should be necessary for that purpose. Trial, and verdict for the plaintiff, in the Superior Court, before Brigham, J., who allowed exceptions which were argued and overruled in this court at March term 1868; as reported, 99 Mass., 344.

After the argument of the exceptions, and before the judgment overruling them was entered in the Superior Court, the defendant filed her petition in bankruptcy, under the Bankrupt Act of 1867, Chapter 176, in the District Court of the United States, for this district; and thereupon, on her motion, the Superior Court ordered a continuance of the case to await the result of the bankruptcy proceedings. In those proceedings a discharge was granted to her in due course of law; which discharge she then pleaded in bar of judgment in this action.

The question whether this plea was valid was submitted to the Superior Court, on facts agreed substantially as above stated, and ruled in favor of the defendant; and the plaintiff appealed.

J. G. Abbott and *B. Dean*, for the plaintiff.

* 104 Mass. Rep., 245.

First. The Bankrupt Act of 1867, Chapter 176, provides in Section 33, that a discharge under the act shall not release the bankrupt from debts created while he was "acting in any fiduciary character." The question is, whether the defendant's debt to the plaintiff falls within this exception.

Second. The defendant had no interest in the bills of exchange, except as trustee to appropriate the proceeds to pay the debt due to her intestate, and to pay over the balance, if any, to the plaintiff. The relation between them was that of pledgor and pledgee.

A pledgee is a trustee of all the proceeds over and above the amount necessary to pay the debt for which the pledge is made; and his relation to those proceeds is to be governed by the principles of law regulating the relation of trustee and *cestui que trust.* *Stevens* v. *Bell*, 6 Mass., 339 and 343; *Middlesex Bank* v. *Minot*, 4 Met., 325. See also Story on Bailments, Sections 310, 319; *Farnam* v. *Brooks*, 9 Pick., 212; *Hatch* v. *Hatch*, 9 Ves., 292; Jeremy's Eq., 142, 143; *White* v. *Platt*, 5 Denio, 269; *Taylor* v. *Bates*, 5 Cowen, 376; *Rathbun* v. *Ingalls*, 7 Wend., 320; *Kingsland* v. *Spaulding*, 3 Barb., Ch. 341; *Duguid* v. *Edwards*, 50 Barb., 288.

Third. Such being the relation created between the parties, it follows that the debt sought to be recovered was created by the defendant while she was acting in a fiduciary character. The phraseology of the Bankrupt Act of 1841, C. 9, Section 1, was as follows: All persons "owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," shall be entitled to the benefit of the act.

Under that statute this court, and the Supreme Court of the United States, held that a debt due from a factor for the proceeds of goods consigned was not within the exception, and so was discharged. *Hayman* v. *Pond*, 7 Met., 328; *Chapman* v. *Forsyth*, 2 How., 202. But the Supreme Court of the United States put their decision entirely upon the phraseology of the act. Such being the established construction of the statute of

1841, Congress, in enacting the corresponding provision of the present statute, instead of enumerating particular cases of express trusts, provided generally that any debt created by the bankrupt while acting in any fiduciary character should not be discharged; and under this statute several of the District Courts of the United States have decided that a debt created for the proceeds of goods consigned to a commission merchant is of a fiduciary character within its meaning. *In re* Seymour, 1 N. B. R., 29. *In re* Kimball, 2 N. B. R., 354. A *fortiori* is a debt created for the balance of the proceeds of pledged property, after paying the debt for which it was pledged, within the exception of the present statute.

R. M. Morse, Jr., and *I. O. Teele*, for the defendant.

WELLS, J.—The provision of the Bankrupt Act of 1867, upon which the plaintiff relies, is "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged," etc. It is argued that the deposit of the securities made the defendant a trustee for the owner; first, to apply the proceeds, so far as required, to the payment of the debt due to the estate of which she was the administratrix; second, to return the balance, if any, to the depositor; and that this trust constituted a fiduciary relation, such as the statute contemplates. This would require an interpretation so broad that almost all pecuniary obligations, especially those implied by law, would be included in the exemption.

We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to or independently of the particular transaction from which the debt arises. The collocation tends to favor this interpretation. If the phrase "while acting," etc., be referred to that which immediately precedes, it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or at least breach of trust.

The debt, in this case, arose exclusively out of a single trans-

action between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. The only default consisted in the non-payment of the balance due to the plaintiff, after satisfying the purpose of the pledge. The debt did not result from, but preceded, that default.

It is due from the defendant personally, and not as administratrix. Towards the plaintiff she sustained no "fiduciary character," while acting in which this debt was created by her. It is simply a debt by contract, like any other which results from the rightful possession of money that belongs to another. We are of the opinion, therefore, that this debt does not come within the meaning of the clause of the Bankrupt Act above quoted.

It is a question of construction of an act of Congress, which can be finally settled only by the Supreme Court of the United States. That court has given a construction to the phrase "while acting in any fiduciary capacity," as it occurs in the Bankrupt Act of 1841, which would exclude the debt now in controversy from the class of fiduciary debts. (*Chapman* v. *Forsyth*, 2 How., 202, 208.) It is true that in the act of 1841 the phrase followed an enumeration of certain trusts of a marked character, and the association was regarded as an indication of the intent of Congress in the use of that phrase. But that intent having been ascertained and declared by a judicial construction of the act, the language thenceforth bore a legal significance, in accordance with that construction. When the same or substantially the same language was subsequently used for a similar purpose in the Bankrupt Act of 1867, it is to be presumed that it was so used in view of the construction and legal import which had become attached to it by the interpretation of the proper constitutional tribunal.

The argument that the omission, in the act of 1867, of the specific trusts named in the act of 1841, by removing the reason, or one of the reasons, for the construction given to the earlier act, indicates that "fiduciary character" was used in a different sense in the later act, does not strike us as entitled to much weight,

notwithstanding the reasoning and the consideration due to the judgment of so highly respectable a court as the District Court of the United States for the Southern District of New York, supported, as we understand it to be, by the affirmance of the Circuit Court for that circuit. On the contrary, it appears to us that the inference is quite as legitimate that Congress omitted the enumeration of specific trusts, for the very reason that the term "fiduciary capacity" had, by judicial construction, received a fixed definition, and with intent that the phrase should carry that definition into the new act. The specific enumeration was omitted because all were included in the general expression "fiduciary." The association of those specific trusts originally was held to be an indication of intent in the general purpose. That intent having been ascertained, has been affixed to the general term, and become legal construction. (*Commonwealth* v. *Hartnett*, 3 Gray, 450; *Tucker* v. *Oxley*, 5 Cranch, 34, 42.) If Congress had intended to adopt a different test of fiduciary debts, we may presume that the intent to change the previous judicial construction would have been indicated by some distinct provision to that end, rather than left to inference from the mere omission of associate words which had ceased to be of any importance as affecting the scope of the provision.

Such omission could be expected to have no effect other than, at most, to render this whole branch of the provision undefined, and without means of definition otherwise than by a new judicial construction. We cannot suppose that Congress directed its legislation so vaguely.

Our conclusion is, that this provision of the Bankrupt Act of 1867 was framed in view of and with the intent to adopt the construction which the Supreme Court of the United States had put upon the similar clause in the Bankrupt Act of 1841. We adhere to that construction as applicable to the act of 1867, until the same court shall declare otherwise. The result is that the judgment of the Superior Court in favor of the defendant must be affirmed.

SUPREME COURT—MASSACHUSETTS.

A conspiracy to obtain goods under color of a purchase upon credit, by one of the conspirators, from such persons as he could induce to part with such goods by his falsely pretending to them that he intended to take the goods to his shop to sell in the ordinary course of trade; and, having so obtained the goods, not to take them to the shop, but to secrete them, and cheat and defraud said persons of them, is indictable as a conspiracy to obtain the goods by a false pretense, within the Gen. Sts., C. 161, Section 54, and St. of 1863, C. 248, Section 2.

An indictment which avers that the defendants conspired to obtain "dry goods of an alleged value, under color and pretense of a purchase upon the credit of one of the conspirators, of and from such parties as could thereafter be induced by him to part with such goods under the false and fraudulent pretense thereafter to be made by him to them, that he intended to take said goods to his retail shop, specifying its location, for the purpose of selling them there to his customers by retail, in the usual and ordinary course of retail trade," sufficiently avers that the defendant conspired to obtain the goods by means of the false pretense; it is not bad as charging a pretense of a promissory character for the future and not relating to a present fact; it describes the substance of the pretense sufficiently: and also sufficiently describes the goods to be obtained by it within the Gen. Sts., C. 161, Section 54, and St. of 1863, C. 248, Section 2.

The liability of a bankrupt to criminal prosecution in the courts of the United States, under Section 44 of the Bankrupt Act of 1867, for obtaining goods on credit, with intent to defraud, and under false color and pretense of dealing in the ordinary course of trade, within three months before the beginning of the proceedings in bankruptcy, does not exclude the courts of the Commonwealth from jurisdiction of him and others for conspiring to obtain the goods by the false pretense, under Gen. Sts., C. 161, Section 54, and St. of 1863, C. 248, Section 2.

It is no defense to an indictment that the facts in proof show that the defendant committed an offense of a higher degree than that charged.

COMMONWEALTH *v.* ANDREW J. WALKER *et al.**

INDICTMENT averring that Andrew J. Walker, Edward C. Walker, and George C. Hale, on May 1, 1871, at Lawrence, "being evil disposed persons, and devising and intending to cheat and defraud, did falsely and fraudulently combine, conspire, confederate, and agree among themselves, unlawfully and fraudulently to acquire, and get into their hands and possession, divers large amounts of dry goods, wares, and merchandise of the value of ten thousand dollars," under color and pretense of a purchase of said dry goods, wares, and merchandise by the said George C. Hale, upon the credit of the said George

* 108 Mass. Rep., 307.

C. Hale, of and from such parties as could thereafter be induced by the said George C. Hale to part with their dry goods, wares, and merchandise, under the false and fraudulent pretense, thereafter to be made to such parties by said George C. Hale, that the said George C. Hale intended to take said dry goods, wares, and merchandise to his, the said George C. Hale's, retail store in said Lawrence, for the purpose of selling said dry goods, wares, and merchandise at said store to the customers of the said George C. Hale, by retail, in the usual and ordinary course of retail trade; and the said Andrew J. Walker, Edward C. Walker, and George C. Hale, did then and there falsely and fraudulently combine, conspire, confederate, and agree among themselves, not to take such dry goods, wares, and merchandise, as they, the said Andrew J. Walker, Edward C. Walker, and George C. Hale might thereafter get into their hands and possession in pursuance of the false and fraudulent conspiracy and pretense aforesaid, to the said retail store of the said George C. Hale to sell at retail at said store to the customers of the said George C. Hale in the usual and ordinary course of retail trade; but the said Andrew J. Walker, Edward C. Walker, and George C. Hale, did then and there falsely and fraudulently conspire and agree among themselves to secrete and conceal said dry goods, wares, and merchandise, and to remove the same from said Lawrence, and to cheat and defraud thereof such parties as could be induced by the said George C. Hale to part with said dry goods, wares, and merchandise, under the false and fraudulent pretense aforesaid."

Geo. C. Hale pleaded guilty to the indictment; and Edward C. Walker was never arrested. Andrew J. Walker filed a plea to the jurisdiction, for that on or about June 24, 1871, Hale was adjudged a bankrupt by the District Court of the United States for the District of Massachusetts, under the United States Bankrupt Act of 1867, C. 176, "Wherefore the said Andrew J. Walker says that, if he did conspire with the said Edward C. Walker and George C. Hale in the manner set forth in said indictment, always protesting his innocence of the same, the courts of the United States have exclusive jurisdiction of the

offense." This plea was overruled, and he pleaded not guilty and before the jury were empanelled he moved to quash the indictment on the grounds that it set forth no offense, and that it was a double, vague, uncertain, and contradictory, which motion was also overruled.

At the trial, Hale was a witness for the Commonwealth; and under the objection of Andrew J. Walker, the Commonwealth was permitted to introduce, among other evidence, testimony to conversations of Hale and of Edward C. Walker. But in submitting the case to the jury, the judge especially instructed them "that unless they were satisfied by the testimony in the case other than the testimony objected to, that Andrew J. Walker was a party to the conspiracy alleged in the indictment at the date of the acts, declarations, and matters stated or referred to in the testimony objected to, they must exclude the testimony so objected to, from the case altogether."

The jury found Andrew J. Walker guilty; and he moved to set aside the verdict, "because the indictment charges the defendant with a misdemeanor, and because it appeared in evidence on the trial of the indictment, that the conspiracy alleged therein was an executed conspiracy; that the acts and offenses, which the indictment alleges the defendants conspired to commit, were actually committed by them, and that the said acts and offenses amount to a felony, and the misdemeanor is merged in the felony." The judge overruled the motion; and Andrew J. Walker alleged exceptions, which were argued at Boston before all the judges but.

T. H. Sweetser and *W. S. Knox*, for Andrew J. Walker.

C. Allen, Attorney-General, for the Commonwealth.

CHAPMAN, C. J.—By the Gen. Statutes, C. 161, Section 54, "whoever designedly, by a false pretense, or by a privy or false token, and with intent to defraud, obtains from another person any property," shall be punished, etc. By the latter clause of the section, if the false pretense relates to the buyer's means or ability to pay, it must be in writing in order to create the

offense. But the pretense here alleged is not within that clause. By the Statute of 1863, C. 248, Section 2, "whoever, under false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains from any person goods or chattels, with intent to defraud, shall be punished," etc. This is an addition to the former statute. It is contended that the indictment sets forth no conspiracy to make use of such pretense as these statutes contemplate. But the definition of false pretense in *Commonwealth* v. *Drew*, 19 Pick., 179, 184, is "a representation of some fact or circumstance calculated to mislead, which is not true." A man's intention is a matter of fact, and may be proved as such. *Fisk* v. *Chester*, 8 Gray, 506; *Kelly* v. *Cunningham*, 1 Allen, 473. In many cases, and especially in criminal cases, it is a material fact, and a dealer in dry goods would be greatly influenced by his belief as to the intent of the purchaser in obtaining the goods. If he believed that the intent was to conceal them and defraud him of them, he would be deterred from selling them on credit; but if, on the contrary, he believed that the intent was to take them to the purchaser's retail store, and sell them to his customers in the ordinary course of retail trade, he might be likely to sell them on credit. A false pretense as to this matter would be not less material than a false pretense that the buyer owns certain property, as in *Commonwealth* v. *Lincoln*, 11 Allen, 233. The language of the statute is very general, and the false pretense set forth in the indictment is within it. It need not be accompanied by any false token or symbol.

The alleged representation was not promissory, and cannot be regarded as a mere promise or assurance for the future, but related to a present fact.

It is objected that it does not appear that the goods were to be obtained by means of the false representations. But the allegation is, that they were obtained "under color and pretense of a purchase" by Hale upon his credit, "under the false and fraudulent pretense," etc. The first of the statute above cited was the phrase "by a false pretense." The other was the phrase "under false color and pretense." Both of these phrases

are substantially equivalent to the words "by means of a false pretense." The allegation is sufficient. *Commonwealth* v. *Wallace*, 16 Gray, 221.

It is objected that there is no sufficient description of the property to be obtained. But a conspiracy to obtain dry goods generally would be within the statutes; and an allegation which is sufficiently specific to be within the statute, must be sufficient.

As the conspiracy was to do an act made criminal by statute, it is not necessary to inquire whether an allegation of a conspiracy to do an act merely unlawful and not criminal, would be sufficient.

It is objected that the statement of the false pretense is not sufficient. But the statement is substantially like that which it is suggested in *Commonwealth* v. *Wallace*, cited above, would be sufficient. See also *State* v. *Roberts*, 34 Maine, 320; *State* v. *Keach*, 40 Verm., 113. No case holds that the words of the false pretense which the parties intend to make should be set forth. The substance of the pretense is stated in this indictment sufficiently for all useful purposes.

The defendant sets up by plea that the court has no jurisdiction of the offense because Hale has been adjudged a bankrupt, and therefore the courts of the United States have exclusive jurisdiction of the offense. By the 44th Section of the Bankrupt Act of 1867, if any debtor or bankrupt shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud, he shall be deemed guilty of a misdemeanor; and upon conviction thereof in any court of the United States, shall be punished, etc. It is contended, that the liability of Hale to be punished under this act, takes away the jurisdiction of the State courts as to Walker. But the facts necessary to be proved to convict one under this section of the Bankrupt Law, are, 1st, the obtaining of the goods under color of the false pretense and with the fraudulent intent stated; and, 2d, the

proceeding in bankruptcy within three months afterwards. The difference between that offense and the offense here set forth is obvious. That statute does not reach this offense, which consists in the conspiracy. The criminal jurisdiction of the courts of the United States is limited, being merely such as is expressly given by statute. *Commonwealth* v. *Tenney*, 97 Mass., 50, 56. Had it been otherwise, the jurisdiction of the United States Courts would have been concurrent with that of the State courts, in a case like this. *Fox* v. *Ohio*, 5 How., 410. The plea was properly overruled.

There is no valid ground for sustaining the motion to set aside the verdict on the ground that the execution of the conspirators' plan was a felony, and merged the lesser offense of the conspiracy. The fact that the defendant has been guilty of a higher offense than that alleged is no defense. This is so even in manslaughter, where it is no defense that the actual crime was murder. *Commonwealth* v. *McPike*, 3 Cush., 181.

Exceptions overruled.

SUPREME COURT—MASSACHUSETTS.

In an action in a State court on a debt provable in proceedings against the defendant under the United States Bankrupt Act of 1867, C. 176, and of a nature to be barred by a valid discharge in those proceedings, the validity of a discharge granted to him therein cannot be impeached on account of a fraudulent conveyance of his property, but the remedy given by application to the District Court of the United States under Section 34, is exclusive.

SAMUEL A. WAY *v.* NELSON HOWE.*

CONTRACT on a promissory note made by the defendant. The answer set up a discharge in bankruptcy granted to him by the District Court of the United States for the District of Massachusetts, in proceedings begun under the United States Bankrupt Act of 1867, C. 176, after the making of the note. The plaintiff replied that the discharge was invalid because the

* 108 Mass. Rep., 502.

defendant, before the bankruptcy and in contemplation thereof, transferred part of his property, for the purpose of preventing it from coming into possession of the assignee in bankruptcy, and being distributed under the act, in satisfaction of his debts.

At the trial in the Superior Court, before Devens, J., it was admitted by the plaintiff that the claim in suit was provable (though not proved) against the defendant's estate in bankruptcy; and that the discharge was granted as alleged, and if valid, would bar the action. But the judge ruled that the plaintiff, "for any such reasons as set forth in the replication, could not impeach or invalidate in this court the said discharge," and directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

G. S. Hillard, for the plaintiff.

C. S. Lincoln, for the defendant.

GRAY, J.—This case presents the question whether a certificate of discharge granted by the District Court of the United States under the Bankrupt Act of 1867, C. 176, can be impeached in a State court (in an action brought upon a debt which was provable against the estate in bankruptcy, and which was of a nature to be barred by a valid discharge) on account of a fraudulent conveyance of property by the bankrupt.

It is not doubted that Congress, under the power to establish a uniform system of bankruptcy, may prescribe the conditions upon which a certificate of discharge shall be granted, and the intent and degree of its effect; and that the question before us is, therefore, to be determined by the provisions of the statute. (*Payson* v. *Payson*, 1 Mass., 283; *Burnside* v. *Brigham*, 8 Met., 75.) Those provisions, so far as they are material to the question at issue, are as follows:

By the 1st Section the District Courts of the United States are constituted Courts of Bankruptcy, with original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and authority to hear and adjudicate upon the same according to the provisions of the act.

By Section 21, "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of discharge; provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge;" and provided, also, that the suit may, by leave of the Court in Bankruptcy, proceed to judgment for the single purpose of ascertaining the amount due.

By Section 29 the bankrupt, within the time therein limited, and not exceeding, in any case, a year from the adjudication in bankruptcy, "may apply to the court for a discharge from his debts, and the court shall, thereupon, order notice to be given by mail to all creditors who have proved their debts," and, by publication in the newspapers, "to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt;" and "no discharge shall be granted, or, if granted, shall be valid," if the bankrupt has made any fraudulent conveyance of his property, or done either of certain other acts therein enumerated. By Section 31, "any creditor opposing the discharge of any bankrupt, may file a specification, in writing, of the grounds of his opposition, and the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the District Court."

Section 32 provides that, if it shall appear to the court "that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided," and shall give him a certificate thereof in form prescribed.

Section 33 provides that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act."

Section 34 provides that "a discharge duly granted under this act, shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were, or might have been proved against his estate in bankruptcy; and may be pleaded by a simple averment, that, on the day of its date such discharge was granted to him, setting the same forth in *haec verba*, as a full and complete discharge to all suits brought on any such debts, claims, liabilities, and demands; and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge; always provided, that any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge, on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in Section 29 it is intended to give evidence of, against the bankrupt, setting forth the grounds of avoidance;" and if, after notice and hearing, the court shall find that any of the fraudulent acts alleged are proved, "and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled;" but if the court shall find that all the fraudulent acts alleged are not proved, "or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings."

The words "with the exceptions aforesaid," in Section 34, like the words "except as hereinafter provided," in Section 32, clearly refer to those debts which, by the intermediate section, are declared not to be barred by any discharge under the act.

With this reservation, Section 34 explicitly declares that "a discharge duly granted under this act" (that is to say, by the

court, and in the manner already pointed out) "shall release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy," and "may be pleaded as a full and complete discharge to all suits brought thereon," as well as that "the certificate shall be conclusive evidence in favor of such bankrupt, of the fact and regularity of such discharge."

The only restriction upon these sweeping and comprehensive words is to be found in the ensuing proviso in the same section, which allows any creditor, whose debt was either proved or provable against the estate in bankruptcy, to apply to the Court of Bankruptcy within two years afterwards, and, upon alleging and proving either of the causes mentioned in Section 29, and also proving his own ignorance thereof, until after the granting of the discharge, to obtain a judgment setting aside and annulling it. If he fails to prove either such fraudulent act of the bankrupt, or such ignorance on his own part, judgment is to be rendered in favor of the bankrupt, and the validity of the discharge is not affected.

The decisions under the insolvent laws of this Commonwealth, or the earlier Bankrupt Acts of the United States, are inapplicable to this case; because the former contained no provision for entirely setting aside or annulling a discharge once granted, and therefore its invalidity for any of the causes specified in them could only be alleged and proved whenever the discharge was pleaded in any action on a debt; and in the latter the right to impeach the discharge in any such action was expressly reserved. Stat. 1838, C. 163, Section 10; Gen. Stats., C. 118, Sections 87, 88; U. S. Stats. 1800, C. 19, Section 34; 1841, C. 9, Section 4.

The intention of Congress in the Bankrupt Act of 1867, in omitting any such reservation in Sections 29 and 34, and in giving a new proceeding by which any creditor, whose debt was proved or provable, may, upon proving a fraudulent act of the bankrupt, have the discharge set aside and annulled, if that act was unknown to him before the discharge was granted, but not otherwise, appears to us to have been, that the question

of the discharge of the bankrupt from all debts and claims whatever (except of those classes which are declared not to be affected by any certificate of discharge), should be finally and conclusively settled by the Court of Bankruptcy within a moderate time, leaving the bankrupt, if he prevail in such trial of that issue, free from future suit, molestation, or embarrassment on account thereof; and that every creditor should be obliged to try the question of the validity of the discharge, if at all, while the facts upon which it depends are comparatively recent, and in such manner as to enure to the benefit of all the creditors if the discharge is annulled, and should not be allowed to wait until the period prescribed by the General Statutes of Limitations has nearly expired, and the bankrupt has perhaps established himself anew in business and suffered the means of disproving the charges against him to pass beyond his reach, and then bring a suit to which the other creditors are not parties, and thus harass him on account of his old debts, and obtain an inequitable advantage over them. It follows, that the remedy given by application to a District Court of the United States under Section 34 of the Bankrupt Act, is exclusive of any other mode of impeaching the validity of a discharge, either in the Federal or in the State courts, on account of a fraudulent conveyance by the bankrupt in violation of the Bankrupt Act. *Simms* v. *Slacum*, 3 Cranch, 300, 308; *Crocker* v. *Marine National Bank*, 101 Mass., 240; and authorities cited.

This conclusion is supported by an able judgment of the Supreme Court of Maine, in *Corey* v. *Ripley*, 57 Maine, 69, S. C., 4 N. B. R., and by a decision of the Court of Appeals of New York, in *Ocean National Bank* v. *Olcutt*, 46 N. Y., 12. See also *Linn* v. *Hamilton*, 5 Verm., 305. The opposing decision in *Beardsley* v. *Hall*, 36 Conn., 270, appears to have been made without a thorough examination of the provisions of the Act of Congress.

We are therefore of opinion that it was rightly ruled by the Superior Court, that the defendant's discharge in bankruptcy could not be impeached or invalidated in this action for the cause stated in the replication. Exceptions overruled.

SUPREME COURT—MASSACHUSETTS.

The liability of the drawer, upon a bill of exchange payable to his own order, to a subsequent indorser who pays it after it has been dishonored by the acceptor, does not first accrue at the time of such payment, but the Statute of Limitations begins to run against it from the time of the dishonor of the bill.

The liability of a drawee, upon a bill of exchange accepted and dishonored by him, to an indorser who then pays it, is barred by a discharge of the drawee in bankruptcy proceedings begun after his dishonor of the bill, though before the payment by the indorser.

THOMAS J. HUNT *et al. v.* DAVID H. TAYLOR *et al.**

Contract on a bill of exchange.—The case was submitted to the judgment of the court on agreed facts, and argued at March term, 1871; and is stated in the opinion.

H. C. Hutchins and *H. H. Currier*, for the plaintiffs.

W. C. Endicott, for the defendants.

BY THE COURT.—The defendants made a draft on David H Taylor, dated November 2d, 1860, payable six months after date to their own order, and indorsed it to the plaintiffs. The plaintiffs indorsed it to William H. Dunbar, and on the 10th of April, 1867, the draft not having been paid, Dunbar brought an action against the plaintiffs and defendants; but one of the defendants having been discharged in insolvency, and the other in bankruptcy, he discontinued as to them, and recovered judgment against the plaintiffs. The judgment was paid by the plaintiffs August 16th, 1869, and this action is brought to recover the money thus paid, as money paid to the defendants' use. The defendants set up their several discharges in defense; and they also plead the Statute of Limitations.

The right of action upon the instrument itself accrued at the time of its dishonor, namely, in May, 1861; and the writ in this action is dated March 21st, 1870. Thus it appears that the statute would be a bar to an action upon the contract, and if the action can be maintained, it must be for money paid to the use of the plaintiffs on the 16th of August, 1869.

* 108 Mass. Rep., 508.

We need not decide the question whether one who thus takes up a bill, on which he is liable as indorser, may recover for money paid, as a right then first accruing, against the real debtor or party alternately responsible; being satisfied that such right does not exist against one who is merely drawer or indorser of the bill. The undertaking of drawers or indorsers, defined by their relations to the instrument, is special and contingent. It is collateral to that of the acceptor. They are held to answer for the payment of the bill by the acceptor at maturity. No other obligation is imposed upon them, or implied by law from their relations to the instrument. Against that, the statute begins to run from the time when their liability is fixed.

Upon the agreed statement, the defendants, whether as drawers or indorsers, are not the parties from whom the amount of the bill is due as their own debt. Being liable only upon the bill itself, the claim against them is barred by the Statute of Limitations.

David H. Taylor, one of the defendants, is also acceptor of the bill. If any different liability might arise against him from that relation, it is barred by his discharge in bankruptcy. The United States Bankrupt Act of 1867, Chapter 176, in Section 19, provides for the proof and allowance of claims by "any person liable as bail, surety, guarantor, or otherwise for the bankrupt," who has not paid the debt, but is still liable for the same; and by Section 34 all such claims are released by his discharge. The certificate of discharge is a complete defense in this case. *Mace* v. *Wells*, 7 How., 272. The validity of the discharge cannot be controverted here. *Burper* v. *Sparhawk*, 4 N. B. R.; *Way* v. *Howe*, 4 N. B. R.

SUPREME COURT—MASSACHUSETTS.

If a creditor, who was fraudulently omitted from the schedule filed by a bankrupt in proceedings under the United States Bankrupt Act of 1867, C. 176, and had no actual knowledge of those proceedings until after

the granting of a discharge to the bankrupt, applies to the District Court of the United States, under Section 34, to annul the discharge for that cause, he cannot afterwards impeach the discharge in an action on his debt in a State court.

PIERSON T. K. BURPER *et al.*, *v.* DAVID H. SPARHAWK. *

Tort. Writ dated October 5th, 1865. Trial in January, 1867, and verdict for the plaintiffs, in the Superior Court, before Ames, J., to whose rulings the defendant alleged exceptions, which were argued at October term, 1867, and in February, 1868, were overruled, as reported in 97 Mass., 342. Pending those exceptions, the defendant, in September, 1867, filed his petition in the District Court of the United States, under the United States Bankrupt Act of 1867, C. 176, and on January 11th, 1868, obtained his discharge as a bankrupt. This discharge he pleaded in March, 1868, in bar of further proceedings in this case. The plaintiffs, in December, 1868, filed a replication to the plea, denying the validity of the discharge, on the ground that it was obtained by fraud, and specifying that the defendant fraudulently omitted their names from the schedule of his debts which he filed under oath at the beginning of the proceedings in bankruptcy, and that they had no notice of those proceedings till after the discharge. And the case was continued in the Superior Court from term to term, until September, 1871. Meanwhile, the plaintiffs, on July 3d, 1869, filed a petition in the District Court of the United States under Section 34 of the Bankrupt Act, to set aside and annul the discharge on the same grounds specified in their replication; notice was thereupon issued to the defendant; and the parties proceeded to a hearing in the District Court upon those specifications, which is not yet finished.

At September term, 1871, of the Superior Court, the plaintiffs put the case again upon the trial list, and sought to proceed to a trial of the issue raised by the plea and replication. The defendant objected that "the validity of the discharge in bankruptcy could not be tried or impeached in this court for any cause for which it might have been annulled in the District

* 108 Mass. Rep., 111.

Court, or for which it might have been refused by said court; that that question could only be tried in the courts of the United States; and especially in this case that the plaintiffs ought not to be permitted to try the question in the State court, as they had already commenced proceedings in the District Court for annulling the discharge, and these proceedings were still pending, and the jurisdiction of the last-named court of the subject-matter is exclusive." But Brigham, C. J., overruled the objections, and permitted the plaintiffs to go to the jury upon the following issue: "Did the defendant willfully omit the names of the plaintiffs from his schedule of creditors in the proceedings wherein he obtained his discharge, with a purpose by so doing of preventing the plaintiffs from having the means of notice or knowledge of such proceedings, and participation in their benefit to his creditors." The jury found upon the issue in the affirmative; and thereupon the court ordered judgment for the plaintiffs upon the former verdict, and the defendant alleged exceptions.

P. E. Aldrich, for the defendants.

G. F. Verry, for the plaintiffs.

GRAY, J.—In *Way* v. *Howe*, 108 Mass. Rep., 502, after full consideration of the able arguments made in that case and in this, it has been adjudged that a certificate of discharge granted by the District Court of the United States under the Bankrupt Act of 1867, C. 176, could not be impeached in an action brought in the courts of this Commonwealth (upon a debt falling within either of the classes excepted in Section 33, and which was provable against the estate in bankruptcy) on account of a fraudulent conveyance of property by the bankrupt, which would, by Section 29, invalidate the discharge; and that the only mode of relief was by application to the District Court of the United States, under Section 34, to set aside and annul the discharge.

Another of the cases mentioned in Section 29 in which "no discharge will be granted, or, if granted, shall be valid," is "if the bankrupt has willfully sworn falsely in his affidavit an-

nexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact." It is upon this clause that the plaintiffs rely, and there can be no doubt that it covers the case of the fraudulent omission of a creditor in the schedule of debts verified by oath, which the bankrupt is obliged by Sections 11 and 42 to file at the commencement of the proceedings in bankruptcy.

The plaintiffs contend that a creditor whose debt is fraudulently omitted in the schedule, and to whom therefore no notice of the bankrupt's application for a discharge is sent by mail under Section 29, is not a party to the proceedings in bankruptcy, or barred by any decision of the United States court in the matter of the discharge. And so it has been held by the Supreme Court of Vermont, upon the ground that, having no notice of the proceedings, he could not be affected by them. *Batchelder* v. *Low*, 43 Verm., 662.

On the other hand, it is to be observed that a creditor, whose debt is omitted from the schedule by mistake and without fraud, has no more notice of the proceedings in bankruptcy than if the omission was fraudulent, and yet an innocent omission does not affect the validity of the discharge. *Burnside* v. *Brigham*, 8 Met., 75; *In re* Needham, 1 Lowell, 309. Section 29 requires that, in addition to the notice by mail to all creditors mentioned in the schedule, notice shall be given by publication in the newspapers of the bankrupt's application for a discharge, which is equivalent to the only notice to other persons interested in the estate; after the publication of which they are bound at their peril to take notice of the issuing of the warrant and the proceedings under it, whether they had or had not any actual knowledge thereof. *Stevens* v. *Mechanics' Savings Bank*, 101 Mass., 109. Any creditor whose debt is provable, whether it was proved or not, may object to the granting of the discharge, or apply to the United States District Court, sitting in bankruptcy, to have it set aside or annulled. U. S. St. 1867, C. 176, Sections 31, 34; Book's Case, 3 McLean, 317.

In re Sheppard, 1 N. B. R., 439; *in re* Murdock, 1 Lowell, 362. The cause relied on for impeaching the discharge in this case, like that alleged in *Way* v. *Howe*, above cited, is one of those specified in Section 29, and it is insisted by the defendant that the same rule must apply to the one case as to the other. And it has been so held by the Court of Appeals of Kentucky. *Payne* v. *Able*, 7 Bush, 344.

But we are not required in this case to decide the general question of the effect of a certificate of discharge in bankruptcy against a creditor fraudulently omitted in the schedule, and having no actual notice of the proceedings in bankruptcy; for such a creditor may waive the want of notice, and make himself a party to those proceedings; and we are of opinion that the plaintiffs, by applying to the District Court of the United States, under Section 34, to set aside and annul the discharge for the same cause upon which he relies in this case, have voluntarily made themselves a party to the proceedings in bankruptcy, and submitted the question of their right to impeach the validity of the discharge for this cause to the jurisdiction of that court, and cannot, therefore, now impeach it by any other suit or proceeding.

The case falls within the same principle which has been applied to many others. For example, a citizen of another State, who proves his debt in the course of proceedings under a State insolvent law, which could not constitutionally bind him without his assent, cannot afterwards impeach the validity of the certificate of discharge granted upon those proceedings, except as allowed by that law. *Clay* v. *Smith*, 3 Pet., 411; *Gilman* v. *Lockwood*, 4 Wallace, 409; *Journeay* v. *Gardner*, 11 Cush., 355. And a creditor, whose debt is of such a class, either by reason of its fiduciary character or otherwise, that it would not be barred by any discharge in bankruptcy, still, if he elects to prove it against the estate, cannot afterwards, unless his proof is withdrawn by leave of the Bankruptcy Court, insist upon his exemption from the effect of the discharge. *Chapman* v. *Forsyth*, 2 How., 202, 209; *Ex parte* Tebbetts, 5 Law Reporter, 259; *Morse* v. *Lowell*, 7 Met.,

152; *Fisher* v. *Currier*, *Ib.*, 424; *Gilbert* v. *Hebard*, 8 Met., 129.

Exceptions sustained.

UNITED STATES DISTRICT COURT—ILLINOIS.

A claim for loss under an insurance policy may be set off by the insured against his indebtedness to the company.

Such claims constitute mutual debts or credits within the meaning of the 20th Section of the Bankrupt Act.

The rights of the parties are to be determined by the state of facts at the time of the loss.

Though such set-off gives the complainant a preference, it results from the business relations of the parties as they stood at the time of the loss.

If his indebtedness is not due, and the company is bankrupt, a bill in equity will lie to establish the set-off.

DRAKE *v.* ROLLO, *Assignee, etc., of the* MERCHANTS' INSURANCE COMPANY.

DRUMMOND, J.—The only question in the case is, whether the set-off can be allowed; and we are of the opinion that the plaintiff is entitled to the set-off he claims.

It depends upon the 20th Section of the Bankrupt Law. That section is as follows:

"That in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not provable against the estate: Provided, that no set-off shall be allowed in favor of any debtor to the bankrupt, of a claim purchased by or transferred to him after the filing of the petition."

It is true in this case the plaintiff obtained part of the means which the company possessed, with which to meet its liabilities in case of loss, and by permitting a set-off, it enables the plaintiff to receive payment in full of his claim, while the general creditors of the bankrupt company are only partially paid; and thus he becomes a preferred creditor. But it is a preference growing

out of the business relations of the parties as they stood at the time of the fire which rendered the company insolvent.

As soon as the loss happened there was the relation of debtor and creditor, and there were no special circumstances qualifying that relation.

When the plaintiff complied with the conditions of the policy after the loss, and furnished his proofs, as soon as the specified time had elapsed, it became a subsisting debt against the company, and, at the same time, the plaintiff was the debtor of the company for money payable in the future.

It was then a case of mutual debt and credit, within the meaning of the 20th Section above cited. The parties here trusted each other, and when the plaintiff was called on to meet his indebtedness he would have the right to retain the amount of the loss and pay the balance. The amount thus retained, in one sense, he does not owe, because the law seizes it in his hands if he so wills, and by its own force extinguishes the debt. And the money loaned not being due at the time the bill was filed, and constituting a mutual credit, it is competent for the plaintiff, the company being insolvent, to call on a court of equity to allow the set-off.

Blodgett, J., concurring.

UNITED STATES DISTRICT COURT—ILLINOIS.

The assignee of a claim against an insolvent insurance company for loss under its policies, assigned after notice of insolvency, cannot set it off against his previous indebtedness to the company.

The debts and credits are not mutual under the 20th Section of the Bankrupt Act.

Such a set-off would be unjust and inequitable.

Though courts of equity follow the law in allowing or refusing set-off, special circumstances may control the equity.

An assignee of a claim seeking to establish a set-off, should show, not merely that he is the nominal owner of the claim, but that he has good equitable grounds for relief.

It seems, that a debtor to an insurance company might set off a claim purchased before the filing of the petition, in good faith and for value, if without notice of the insolvency of the company.

A court of equity should construe the 20th Section of the Bankrupt Act, in furtherance of the main purpose of the law, and not permit one creditor to inequitably obtain payment in full, to the sacrifice of the claims of the other creditors.

The language of that section does not foreclose a court of equity from disallowing a set-off when it would work injustice.

HITCHCOCK *v.* ROLLO, *Assignee, etc., of the* MERCHANTS' INSURANCE COMPANY.

THIS was a bill by Charles Hitchcock, against William E. Rollo, assignee of the Merchants' Insurance Co., to establish a set-off.

This case, in many respects, resembles the case of *Drake* v. *Rollo*, assignee, etc., immediately preceding.

The complainant, on the 15th of May, 1867, borrowed of the insurance company the sum of twenty thousand dollars, payable in five years, to secure which he gave his notes, secured by mortgage on real estate in Chicago.

The insurance company was rendered insolvent by the Chicago fire of October 9th, 1871, at which time complainant held three policies of insurance against the company, amounting to eleven thousand dollars, upon which there was a total loss, which was regularly proved up against the company and adjusted.

The company had also issued a policy for one thousand five hundred dollars to the firm of Hitchcock, Dapee & Everts, of which complainant was a member, covering property owned by them, upon which there was also a total loss. The company was also indebted to the firm upon open account, in the sum of eight hundred and seventy-seven dollars. These firm losses were regularly proved up and adjusted, and the company issued to the firm their certificate of indebtedness for the amount, which certificate was, on the 27th of October, assigned and transferred to the complainant, but there was nothing to show that value was actually paid for the assignment. It was admitted that the complainant, at the time of the assignment of the claims to him, knew that the company was insolvent, and that proceedings in insolvency or bankruptcy were imminent.

On the 17th day of November, 1871, a petition in bankruptcy

was filed against the company in the District Court of this district, upon which it was afterwards adjudged a bankrupt, and Mr. Rollo elected the assignee.

This bill sought to set off all of the above claims against the complainant's indebtedness to the company.

Charles Hitchcock, *pro se.*

A debtor for money borrowed may purchase the negotiable notes of an insolvent at any time before the filing of a petition in bankruptcy against him, and set them off under the 20th Section of the Act of 1867, notwithstanding he had notice of insolvency, and purchased for the purpose of making the set-off.

First. The purchase of such paper is a "giving of credit," which is mutual within the meaning of the Bankrupt Law. 2 Smith's Leading Cases, 316, 317; *Hawkey* v. *Smith*, 3 Term Reports, 507; *Collins* v. *Jones*, 10 Barnewell & Creswell, 328.

The rule has never been questioned. In the following cases, cited by Mr. Hoyne in argument, viz.: *Belcher* v. *Lloyd*, 10 Bingham, 310; *Lackington* v. *Combes*, 6 Bingham (N. C.), 71; *Fair* v. *McIver*, 16 East, 130; it appeared that the parties claiming the set-off had no *real* interest in the notes, and the decisions proceed upon that ground.

Second. Such negotiable notes may be set off under the Bankrupt Law.

The only argument against the right is that "if allowed it violates the spirit and policy of the Bankrupt Law, defeats the equal distribution of the assets of the bankrupt, which it is the evident purpose of the act to accomplish, and, in effect, operates as a fraud on it."

Congress has deliberately determined that the occasional failure of the chief purpose of the act in this way is, on the whole, a less evil than uncertainty as to the time within which credit may be given and set-off received.

The earliest Bankrupt Law of England did not provide for the set-off of mutual debts or credits. This omission, as Lord Mansfield says, "shocked the sense of justice of mankind," and

in 1732, by the VI. George II., C. 30, Section 28,the right of set-off was secured "if the credits were given or the debts incurred at any time before the person became bankrupt." The act of bankruptcy was the limit after which credit could not be given. The act seems to have been considered subject to three objections: First, that a person might give the credit to a notorious insolvent, at any time before an act of bankruptcy, and yet secure the set-off. Second, a person giving credit without notice of an act of bankruptcy, might be deprived of his equitable right of set-off. Third, no limitation was fixed beyond which the giving of credit should not be called in question.

No suggestion was ever made in the courts that it was possible to meet these objections by construction based on the spirit and policy of the Bankrupt Law.

In 1806, by the act of 46 George III., C. 135, Section 3, the supposed objections were removed and the right of set-off was secured, notwithstanding a prior act of bankruptcy, "provided the credit was given to the bankrupt two months before suing out the commission, or provided the person claiming the right of set-off had not, at the time of giving such credit, notice of a prior act of bankruptcy, *or that he was insolvent, or had stopped payment.*" Here, for the first time, a set-off was, in terms, denied, where the claimant had notice, at the time of giving it, that the party was insolvent or had stopped payment.

The American Bankrupt Acts of 1800 and 1841 contained no similar provision. (See Sections 10, 13, and 42 of Act of 1800, and 2, 3, and 5 of Act of 1841.)

This act was in force and administered according to its terms for twenty years, when, in 1825, by Act of VI. George IV., only such persons were excluded from the benefit of set-off as had, when they gave the credit, notice of an act of bankruptcy. (*Hawkins* v. *Whitten*, 10 Barnewell & Cresswell, 221.)

The same provision is to be found in all the acts of Victoria. Under these acts the English rule, so far as allowing a set-off where credit was given, even with notice of insolvency, was

made to conform not only to the former English, but also to the American law.

The uncertainties attending the judicial inquiry into "notice of insolvency," was found to be an evil, and therefore the provision was repealed.

In a case arising out of the fire of October 9th, 1871, by which all insurance companies were rendered insolvent, there is no difficulty in fixing notice of insolvency; but rules of law are general, and, in the great majority of cases, the greatest uncertainty and consequent injustice would attend the inquiry.

Congress had these acts before it when the Bankrupt Law was framed. It is a matter of public history that the author of the act, Mr. Jenckes, of Rhode Island, had carefully studied the English legislation upon the subject.

The act of 46th George III. contained language appropriate to accomplish the purpose of excluding the right of set-off in such a case as that before the court and under discussion.

The courts of England had held that the repeal of the language secured the right, notwithstanding known insolvency at the time the credit was given, and yet Congress passed the law of 1867, omitting all provision on the subject.

It was evidently the intention to fix a certain time, viz., the filing of the petition, after which credit should not be given with a view to set-off, and prior to which no inquiry should be made as to notice of insolvency.

The statutes of Massachusetts have a similar history. The early acts provided for a set-off of all claims "existing at the time of the first publication of the notice of the issuing of the warrant." In 1855, in the case of *Aldrich* v. *Campbell*, 4 Gray, 284, it was decided that claims "purchased for a valuable but not a full consideration against a debtor in embarrassed circumstances, who afterwards obtained a certificate of discharge in insolvency," could be set off.

In the following year, 1856, the supposed evil was met by a law providing "that no set-off should be allowed of a claim purchased with reasonable cause to believe the debtor insolvent."

These acts and decisions were before Congress when the Bankrupt Act was passed.

It is wholly improbable that Congress, with attention addressed to the subject, as appeared by the 20th Section, should not have used either the language of the Massachusetts Act of 1856, or the Act of George IV., if the provisions of those acts had been approved. It would seem that, Congress having deliberately and intentionally failed to deny a set-off where the party had notice of insolvency, it should not now be urged that the courts should interpolate the language in the act, and that what was denied by Congress should be accomplished by interpretation.

McCagg, Fuller & Culver, for defendant.

The main argument of the complainant in support of his right to set off claims for losses adjusted and purchased since the bankruptcy of the company, against loans obtained from it, is founded upon the proviso to the first clause of the 20th Section of the Bankrupt Act, as construed in *In re* City Bank, etc., 6 Bankrupt Register, 71.

This clause ought not to be construed as giving authority to allow *all* claims purchased before the filing of the petition, but only as a prohibition against allowing any to be set off which are purchased after that date, leaving those purchased before to be allowed or not, as shall appear just and equitable, according to the previously settled Bankrupt Law.

The allowance of mutual credits is designed to protect parties who have dealt with each other, and to preserve their equities by requiring only the balance to be paid, as shall appear to be due upon the account stated between them. It is not to be construed to allow a party, after adjusting his own claims, and having been allowed his own equities, to purchase the claims of other parties and tack them on his own to increase his allowance, to the prejudice of the other creditors.

The theory of set-off, both in equity and by the Bankrupt Law, is that the balance found due upon a statement of the accounts between the bankrupt's estate and its debtors or credit-

ors, shall be paid to the other by the debtor party, because that would be the result of the dealings between the parties if their transactions were consummated; but it would frustrate all the theory and equities of the law to allow one debtor of the bankrupt estate, after satisfying his own equities, to buy the claims of a party who was simply a debtor of the bankrupt estate from the beginning, and have them allowed in full to satisfy the balance found due after satisfying his own equities.

The complainant did not deal with the bankrupt upon a real or supposed understanding that the claims thus purchased should be set off, and to allow them to be set off in full would be to give him a preference over the creditors of the bankrupt estate. Such preference would be the creation of a right by operation of law, not in favor of either party to the assigned claim, but in favor of one who has had all his own equities allowed and adjusted, and who has purchased no equity from any one else, and could result in an inequitable extinction of his own debt, to the prejudice of the other creditors of the estate.

For this reason and because the Bankrupt Law was framed upon the theory of preserving the equities of the bankrupt, and those dealing with him, in respect of their transactions, the claims purchased after the known insolvency of the bankrupt ought not to be allowed to be used to disturb and destroy the rights of the creditors of the estate.

The complainant may take such a dividend on the assigned claims as the assignor was entitled to, but no more, for he only bought a legal claim, to which no equity was attached, and having had his own equities allowed so far as his own dealings with the bankrupt are concerned, he ought to be satisfied, and the court ought not, by construction, to extend the law of set-off in his favor, and clearly, the express provisions of the Bankrupt Act do not require it.

The authorities founded upon former British and American statutes, and the general equitable rules of set-off, do not allow this to be done. *Smith* v. *Hill*, 8 Gray, 572; *Smith* v. *Brink-*

erhoff, 8 Barbour, 519; 2 Story's Equity, Sections 1435, 6, 7; 2 Smith's Leading Cases, 366, 373, 4, 8; *Smith* v. *Brinkerhoff*, 6 New York, 305; Lee's Law and Practice in Bankruptcy, 283; *Clarke* v. *Hawkins*, 5 Rhode Island, 219; Waterman on Set-off, 190, 1, 2, 3; *Dickson* v. *Evans*, 6 Tenn., 53; *Ogden* v. *Cowley*, 2 Johnson, 274; *In the matter of the Receiver of the Middle District Bank*, 1 Paige, 584; *Steinforth* v. *Fellows*, 1 Marshall, 184; *ex parte* Hale, 3 Vesey, 304.

Thomas Hoyne, for defendant.

Complainant claims to set off a claim for loss under a policy of insurance which he purchased after knowledge of insolvency of the company, caused by the great fire of 1871.

The dealings between the parties consisted of a *single* transaction, that of complainant in obtaining a loan—there were no *mutual dealings; mutual debts* or *credits;* no accounts; neither is the claim of complainant reciprocal, as it did not arise out of the same transaction.

It is insisted that under the 20th Section of the Bankrupt Law this is a *mutual debt*, or a *mutual credit* between the parties to this suit, which, upon an *account between them* being stated, one debt shall or may be set off against the other, and the balance only shall be allowed or paid.

In *Globe Insurance Company*, 2 Edwards' Chancery, 625, as respects this doctrine of the mutual right to set off claims, the Chancellor holds that they must be *such as arise out of the mutual dealings of the parties in the course of their business.* When parties have had dealings so as to produce mutual debts and credits or reciprocal demands—growing out of the *same transaction*, it is the balance only which exists as a debt.

The doctrine of set-off presupposes that there have been *mutual dealings or reciprocal demands* between the parties, and the section of the Bankrupt Act speaks only of *mutual debts and mutual credits between the parties*, and expressly provides for the statement of *the account between them*, and after one debt is set off against the other it is only *the balance* of the account which is to be allowed.

Thus the section provides for the set-off a claim only in cases where the parties have had some mutual dealings, and when *some account* of such dealings exists.

Out of such dealings the claim is to arise, and then, when such account is stated, and one claim is set off against the other, *the balance* only becomes a mutual debt or credit.

Thus the section is in full accord with the nature of all set-offs, to which the whole doctrine of set-off is applicable. And besides this, this construction is in full accord with the policy of the Bankrupt Law, which recognizes only *bona fide dealings;* not contrived to work injustice or fraud, or to secure by any *intrigue* the preference of one creditor over another.

The same construction is placed upon the English statute, although the language of the act is different from ours. *Hawkins* v. *Whitten*, 10 Barnewall & Cresswell, 217; 21 English Common Law Reports, 101; *Fair* v. *McIver*, 16 East, 130; *Jackington, Assignee of Richardson*, v. *Combes*, 6 Bingham, 71; 37 Common Law Reports, 515.

In any case, if it appears that the claim to be set off is the result of a *mere contrivance* or color to make it *appear* that defendant was a *bona fide holder* of the claim, it is treated by the English courts as a fraud upon the act. *Jackington, Assignee of Richardson*, v. *Combes*, 6 Bingham, 71; *Smith* v. *Hill*, 8 Gray, 572; *Howe* v. *Stowe*, 3 Allen, 113; *Smith* v. *Brinckerhoff*, 8 Barbour, 519; *Ogden* v. *Cowley*, 2 Johnson, 274; *Dickson* v. *Evans*, 6 Term Reports, 57.

In *Ogden* v. *Cowley*, 2 Johnson, 274, Chief Justice Kent remarks: "It would be unjust if one person who happened to be indebted to another at the time of his bankruptcy were permitted by any intrigue between himself and another, so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*."

Any act which tends to defeat the purpose and policy of the law, and which is done in contravention of and with intent to defeat such policy and purpose, is a fraud upon the Bankrupt Act. Bump, Notes, 455; *Samson* v. *Burton*, 4

Bankruptcy Register, 1; *In re* Gregg, *Id.*, 150; see Waterman on Set-off, Section 182, citing 8 Barbour, 519.

It would be difficult to conceive of a case where the injustice would be greater or the intention more manifest to defeat the purpose of the act, and where there was so little pretense of *mutuality* of dealing as in this case. The policy of insurance was *purchased after it became known* the company was insolvent—where there had been no dealing, no account kept, and where the claim was purchased after insolvency, with a view to pay a debt due a bankrupt, thus allowing the debtors to purchase in claims at twenty-five per cent., or less, paying their own claims at par, and exhausting the estate of the general creditors.

The next claim to set-off arises out of the relation of the stockholder to the company. Can the stockholder who is indebted upon his stock for *non-payment* of his share or shares set off a debt due him from the company, before his own debt to the company be first paid in full?

First. There are some axioms of equity law which make this claim of the stockholder utterly inadmissible. The creditor must be *first paid.* In all associations of partnership, joint-stock, or corporate organization, the capital is held to be pledged for the payment of the general creditor. The capital is a *trust fund.* If this fund has been distributed, so that it is in the hands of the stockholders, or in the hands of others than *bona fide* creditors, or purchasers, leaving debts *unpaid*, such holders take the property charged with the trust in favor of the creditors.

Second. The capital stock of a corporation is a *trust fund*, for payment of debts of the corporation. Creditors have a lien, or right of priority upon it, in preference to any of the stockholders, and no stockholder can entitle himself to any dividend or share of the capital stock until such debts are paid. 2 Story's Equity Jurisprudence, Section 1252; *Curren* v. *State of Arkansas*, 15 Howard, 307; *Mumma* v. *Potomac Company*, 8 Peters, 281; *Nathan* v. *Whitlock*, 3 Edwards' Chancery, 215; *Nathan* v. *Whitlock*, 9 Paige, 152; *Lawrence* v. *Nelson*, 21 New York, 158.

In *Hillier* v. *Alleghany Mutual Insurance Company*, 3 Pennsylvania State Reports, 470, it is expressly held, that where the funds were not adequate to pay all losses occasioned by a fire which had occurred, the entire funds belong to the losers. The stockholder who is liable for unpaid instalments cannot set off his loss, but must first pay in his capital, and then he shares *pro rata* with other losers. *Long* v. *Penn. Insurance Company*, 6 Pennsylvania State Reports, 421; *Osgood* v. *Ogden*, 43 New York, 70; *Lawrence* v. *Nelson*, 21 New York, 158; *Vose* v. *Grant*, 15 Massachusetts, 505; *King* v. *Fowler*, 16 Massachusetts, 397; *Wood* v. *Drummer*, 3 Mason, 308.

John Borden, also for the set-off, cited, in addition to cases cited by other counsel, the case of *Young* v. *The Bank of Bengal*, 1 Deacon, 622, where the doctrine of mutual credits is elaborately discussed by Lord Brougham, and numerous authorities commented on.

DRUMMOND, J.—The only point not decided in the previous case is as to the claim assigned to the plaintiff. It is admitted that the plaintiff, at the time of the assignment, knew that the company was insolvent, and that proceedings in insolvency or bankruptcy were imminent.

There are two questions which we may consider in this case, as they have both been argued, and exist either together or separately in several of the cases which were taken up at the same time.

First. Can the claims assigned be allowed as a set-off; and, *Second.* Does the knowledge which a person had of the pecuniary condition of the company, and the probable consequences growing out of the same, affect the right of set-off?

As to the first question: If the debt of the plaintiff were due, and no assignment had been made, in a suit brought against the plaintiff, he could not set off the claim due on the policy to him and his two partners, because that would make the partners liable for the individual debt of each member of the firm. *Dehon* v. *Stetson*, 9 Metcalf, 341; Waterman on

Set-off, Section 222, and the authorities there cited. If the case were reversed, and suit were brought by the plaintiff and his partners on the policy against the company, the latter could not set off the debt due from the plaintiff. In each instance there is wanting that mutuality which the statute requires, and the debts exist in different rights. If the joint claim had become vested in the plaintiff, so that he could have brought suit in his own name, it might be different. *Columbian Insurance Company* v. *Black*, 18 Johnson, 149; *Parker* v. *Beasley*, 2 Maule & Selwyn, 423.

The case of *Tucker* v. *Oxley*, 5 Cranch, 34, was cited and relied on at the argument.

A firm had been dissolved and the partnership assets had passed to one of the firm, who had become bankrupt. The assignee brought suit against two persons on a debt due the bankrupt. They were allowed by a majority of the court to set off a debt previously due to them from the firm. This was the ruling under the peculiar wording of the Bankrupt Law of 1800, and seems to be an exceptional case.

It is very doubtful whether that would be proper under the present Bankrupt Law, which contains provisions as to the distribution of the joint and separate estate of partners not in the law of 1800.

An assignee of a firm brought an action on a debt due the firm. It was held, by the Supreme Court of Massachusetts, that the defendant could not set off a debt from one of the partners.

Courts of Equity follow the law in allowing or refusing set-offs, qualified by the rule that special circumstances may control the equity.

What are the special equities of the plaintiff? He alleges that the debt owed by him is not yet due; that the company is insolvent and in bankruptcy, and that the firm claims against the company were assigned to him with knowledge of the insolvency. If we concede that an assignment by the other partners might give the plaintiff the right to a set-off, we think it is incumbent on him, when he comes into a court of equity and seeks to have the assigned claims allowed as a set-off, to

show that he is more than the nominal owner. In other words, his equitable grounds for relief should be clearly established. From all that appears in this case, the fair inference is that these claims were merely transferred to enable the holders of the fifteen hundred dollar policy to realize their claim in full out of an insolvent corporation. No special equities within the true meaning of the rule are shown.

As to the second and more important question—the words "mutual debts," and "mutual credits," used in the 20th Section of the present Bankrupt Law, are not essentially different from those to be found in most of the previous Bankrupt Laws of England and of this country, subject to various conditions and limitations. And the argument is that the court cannot go outside of the language of the section, and that if it is a mutual debt, or mutual credit, it can in all cases be set off, except when it is a claim in its nature not provable against the estate, or one purchased by or transferred to the bankrupt's debtor after the petition in bankruptcy is filed, those only being excluded by the terms of the law. And in support of this position the case of *Hawkins* v. *Whitten*, 10 Barnewell & Creswell, 217, decided under the English Bankrupt Law of 6 George IV., was relied on.

The question there was, whether the defendant had the right to set off notes of the bankrupts obtained by him after he knew that the bankrupts, who were bankers, had stopped, but before he knew that an act of bankruptcy had been committed? And the court decided that he had such right, although he might have reason to believe them to be insolvent.

But the case was decided under a statute which had omitted the words of a previous statute, which declared that the set-off should not be allowed where the party had obtained the claims against the bankrupt after he stopped payment. The omission of such words where the law had been substantially re-enacted, with that exception, was an argument well nigh irresistible in favor of the construction given by the court, notwithstanding Lord Tenterden significantly asked whether it would not be a fraud on the Bankrupt Law.

It is said that in view of such a decision as this, and of the English Bankrupt Laws, the 20th Section of our Bankrupt Law, in making only two exceptions to the right of set-off in the case of mutual debits or credits—one, a claim not provable against the estate, and the other a claim obtained after the filing of the petition—intended to allow all others. That principle goes very far, and we are not prepared to admit it to that extent. We believe many cases may be imagined where a Court of Equity could not permit a set-off, although not within the exceptions. For example: a person might have borrowed the whole capital of the insurance company, and be on the way to its treasurer to pay it, and meet a creditor who informed him he had a petition in his hands ready to be filed in the District Court, and alleging the undoubted fact of the bankruptcy and insolvency of the company. In such a case, if he had taken the money to buy up claims against the company at ten cents on the dollar, would equity allow the set-off because the petition was not then actually filed?

The case supposed is within neither of the exceptions of the 20th Section, and yet we cannot doubt that it would be the duty of a court of equity to disallow a claim of set-off which would thus permit a debtor to absorb the whole capital of the company, by credits so purchased, for the reason that it would be unjust, and a substantial fraud on the Bankrupt Law.

The object of all general rules applicable to the rights of persons should be to promote the greatest good. It is upon that principle that the Bankrupt Law rests—the equal division among all creditors of the property of an insolvent company or individual.

We are called on to make the application of principles—not in a solitary case here and there, but under circumstances calculated to bring to a crucial test the soundness of rules—the insolvency and bankruptcy of numberless insurance companies whelmed in a common ruin, and where, if the doctrine contended for by the plaintiff is maintained, a comparatively few persons, holding all their assets, amounting to millions, can retain them by going into the market and purchasing, with full

knowledge of all the facts, claims against them for a nominal sum.

But one decision under the Bankrupt Law of 1867 was cited on the argument having a bearing on the point now under consideration. *In re* The City Bank of Savings, 4 Legal News, 81, by the District Judge of California. It was held in that case that the fact that the creditor of the bankrupt, at the time he assigned his claim to a debtor, had reason to believe the bankrupt to be insolvent, did not prevent the debtor from setting off against the debt the claim thus assigned.

The report of the case does not state explicitly whether the debtor, at the time of the assignment, knew of the insolvency of the bankrupt, but, perhaps, it may be an inference that such was the fact.

The court overruled the objection, that the effect of allowing the set-off would be a fraud on the law, and seemed inclined to give an absolutely literal construction to the 20th Section, while admitting that the result would be to enable one creditor to obtain full satisfaction of his claim to the prejudice of other creditors.

We admit that this may be so, if there is good faith. We do not doubt that a debtor can purchase a claim against the creditor, at any time before the filing of the petition in bankruptcy, and set it off, provided the purchase is made without notice of insolvency, for value, fairly, and not in fraud of the law; and we thus give full effect to the statute.

If the case decided in California intended to sanction a set-off such as is claimed here, we do not feel inclined to adopt the rule there stated. We hold it to be the duty of a court of equity so to construe the 20th Section as not to suffer it to defeat the main purpose of the Bankrupt Law, or to permit one creditor in this way to obtain the payment of his claim in full, to the sacrifice of the claims of other creditors.

It is said that there must be some time fixed within which doubtful transactions can no longer be questioned. It is for a court of equity, or the Bankrupt Court, in the exercise of its equitable powers, to decide, looking at all the circum-

stances of the case, under what limitations the right shall be placed.

Our attention has been directed to a case not cited on the argument, *Smith* v. *Hill*, 8 Gray's Rep., 572.

In that case the defendant purchased claims against a person, knowing him to be insolvent, and having reasons to believe that he was about to be put into insolvency; and then, in a suit by the assignee, proposed to set off these claims against a debt he owed the insolvent. Under the statute, mutual debts and demands could be set off; but the court held that the effect of allowing the set-off would be to interfere with the proper distribution of the estate of the insolvent, and would be contrary to the spirit of the insolvent laws; that it would enable a debtor to give a preference to such of the creditors as he might favor, and would allow debtors to pay their debts by purchasing claims against the insolvent at a discount.

And that decision was not made under amendments which had expressly prohibited such set-off, but independently of them, and on the general ground that it would be inequitable to permit the set-off.

We think the principles of that case are applicable to this, and that they constitute a true test to determine whether the set-off claimed here should be allowed. See Hilliard on Bankruptcy, 224, who adopts the principle of *Smith* v. *Hill;* Avery and Hobbs on Bankruptcy, 157; Waterman on Set-off, 141.

We are of opinion, therefore, on both of the grounds stated, that a set-off is not allowable.

In construing our Bankrupt Law, we have to regard it as a whole system—framed, doubtless, at that time in view of previous laws, both English and American; but where it was impossible to include all the various circumstances and contingencies which had given occasion to the numerous alterations and modifications of previous laws, and this is especially true of the 20th Section in relation to set-off.

Notwithstanding the language there is general, and only two exceptions are named, we must still think that it did not intend, outside of these exceptions, to foreclose a court of equity

from disallowing a set-off when it would on the whole work injustice.

We think, therefore, we are at liberty to place such a construction on our Bankrupt Law as is in harmony with the common sense of equity; and that such a set-off as the one claimed here ought not to be permitted, is abundantly manifest from the whole tenor of recent legislation, both English and American.

We confess we think we go quite far enough, which we do in obedience to authority, when we admit that a man may borrow a part, or even the whole, of the capital of an insurance company, and then take out policies of insurance, it may be because of the loan, and in case of loss and insolvency of the company, set off the loan against the loss on the policy, even though it may leave other creditors with nothing.

There may be instances where this can be done, when it would be difficult to reconcile it with our notions of a sound morality, or with that rule which requires us to do to others as we would have them do to us.

But we do not feel inclined to go further, and adopt a rule which would permit the debtors of a bankrupt company thus to realize, for a nominal sum, the full amount of their claims on the company, while other creditors thereby go empty-handed.

As to the assigned claims the set-off will not be allowed.

Blodgett, J., concurring.

SUPREME COURT—MASSACHUSETTS.

By an adjudication of bankruptcy under the Bankrupt Act (United States Statutes, 1867, C. 176), even when the proceedings were begun on the debtor's voluntary petition, his property becomes exempt from subsequent attachment on mesne process.

GEORGE W. WILLIAMS *v.* CHARLES MERRITT.*

TORT against a deputy of the sheriff of Essex, for the conver-

* 103 Mass. Rep., 184.

sion of a horse and its harness, a carryall, a sleigh, and other chattels. Trial in the Superior Court, before Lord, J., who reported the case for the determination of this court, substantially as follows :

The plaintiff claimed title to the property under a bill of sale thereof to himself, from Smith T. Downing, dated in January, 1868. On February 27, 1868, Downing filed his petition for the benefit of the Bankrupt Act (United States Statutes, 1867, C. 176), and was duly adjudged a bankrupt; but no meeting of his creditors was held, nor an assignee of his estate appointed, until March 10, 1868.

On March 9, 1868, the defendant, as deputy-sheriff, attached the property on a writ sued out that day against Downing; and the defendant contended that the bill of sale was executed by Downing without consideration, and for the purpose of defrauding his creditors, and that the plaintiff participated in this purpose.

On these facts, the judge ruled that the defendant could not justify under his writ; excluded all evidence tending to impeach the plaintiff's title (it being agreed that a bill of sale was actually made and delivered, but not agreed that any delivery of the property was made), and directed a verdict for the plaintiff, under an agreement of the parties that the case should be open for the assessment of damages, if his ruling should be affirmed, otherwise the verdict to be set aside and a new trial granted.

S. B. Ives, Jr., for the defendant.

First. The defendant can justify under his writ, if not prevented by the Bankrupt Act.

Second. At the time of the attachment, Downing's legal title to his property had not been so far affected by the Bankrupt Act as to relieve it of liability to attachment. There had been no assignment. Hence the right of property remained in him; and gave a right of possession, both as a matter of fact and matter of law, because the marshal is not authorized to take possession of the debtor's property in case of voluntary bankruptcy. This right of property is undoubtedly a qualified right.

The debtor holds his estate as trustee for his creditors; and, whatever may be his rights as against them, he, as their trustee, and any one claiming through him, has a right to hold, and may justify the holding of property claimed to be his, as against third parties, not creditors, whose interest is adverse to the estate.

It is the assignment, and not the filing of the petition in bankruptcy, that dissolves attachments on *mesne* process, and relieves the debtor's property from liability to such attachments. And in any event, the aim and effect of the Bankrupt Act is to remove the debtor's property from the hands of special creditors, and add it to the general funds of the estate for the general benefit of all creditors; and not, in the interest of strangers, and to the disadvantage of the estate, to relieve the debtor's property, or alleged property, from attachments of which the assignee might afterwards avail himself.

W. C. Endicott, for the plaintiff.

GRAY, J.—If this case had arisen while our Insolvent Law was in force, there could have been no doubt that the ruling at the trial was in accordance with the previous decisions of this court. The plaintiff, claiming title under a bill of sale from the debtor, might have maintained this action, unless the defendant could show a better title. *Codman* v. *Freeman*, 3 Cush., 306; *Hubbard* v. *Lyman*, 8 Allen, 520. If indeed an attachment had been made before the institution of proceedings in insolvency, it would not have been dissolved before the assignment, and until that time the attaching officer would have retained the custody of the property attached, and, in case of a discontinuance of the insolvency proceedings before an assignment, and of a subsequent recovery of judgment, might have taken the property on execution. *Cutter* v. *Gay*, 8 Allen, 134; *Hill* v. *Keyes*, 10 Allen, 258. But, upon the execution of an assignment, he would have been bound to deliver the property to the assignee on demand, and such delivery would have exempted him from liability to the attaching creditor in case of the proceedings in insolvency being subsequently annulled by

the court, because commenced without due notice to the debtor. *Penniman* v. *Freeman*, 3 Gray, 245. Even an officer who had attached the property before the commencement of the insolvency proceedings, and who, after the first publication of notice of the issuing of a warrant therein, took it on execution and sold it, and paid over the proceeds, would have been liable therefor to the assignee subsequently appointed, because the title of the latter would have related back to the time of such first publication. *Edwards* v. *Sumner*, 4 Cush., 393. Upon issuing of the warrant in insolvency to the messenger, and his taking possession under it, the debtor would have been divested of his estate; and all his property, not already attached, would have been in the custody of the law, and could not have been attached after the first publication of notice, so long as the proceedings in insolvency were pending. *Judd* v. *Ives*, 4 Met., 401; *Gallup* v. *Robinson*, 11 Gray, 20. The necessary consequence would have been, that the party making an attachment pending proceedings in insolvency could not dispute the plaintiff's title on the ground of fraud. *Pomroy* v. *Lyman*, 10 Allen, 468.

So in *Perry Manufacturing Co.* v. *Brown*, 2 Woodb. & Min., 449, it was held that an attachment upon a writ from the Circuit Court of the United States, after the first publication of notice of the issuing of the warrant under the Insolvent Law of Massachusetts, though before an assignment had been executed, or the property taken possession of either by the messenger or the assignee, was ineffectual.

The existing Bankrupt Act of the United States differs indeed from our Insolvent Law in not authorizing the messenger to take possession of all the bankrupt's property when the warrant is issued upon the bankrupt's own petition. But his property is not the less by the decree adjudging him a bankrupt, brought within the exclusive custody and control of the Court of Bankruptcy. The bankrupt is held by the District Court of the United States in this district, to stand from that time in a fiduciary relation to his creditors. And in the Southern District of New York, the practice is established,

that, upon the bankrupt's executing the surrender which he is required by the act to make, the Register takes immediate possession of his property, and may appoint custodians and make sales thereof, subject to the supervision of the court; and if the bankrupt delays to make a surrender to the Register, the court will order him to do so. *In re* Hasbrouck, 1 N. B. R., 175; *in re* Vogel, 2 N. B. R., 427, and 3 *Ib.*, 198; *in re* Loder, 2 N. B. R., 655; *in re* Bogert, *Ib.*, 651, and *in re* Stetson, *Ib.*, 626. The nature or comparative efficiency of the means provided by the statute to secure the property for the benefit of all the bankrupt's creditors, cannot affect the operation of the adjudication of bankruptcy to bring all his assets at once into the custody of the law, and prevent their subsequent attachment by one creditor for his own benefit.

The defendant cannot, therefore, justify under his writ; and according to the terms of the report, the case stands for assessment of damages.

SUPREME COURT—IOWA.

The Bankrupt Act of 1867 does not wholly supersede or suspend the State Insolvent Laws, but jurisdiction can be exercised thereunder until their authority is called in question by the Bankruptcy Courts.

REED BROS. & CO., *v.* TAYLOR *et al.**

COLE, J.—This is a contest between attaching creditors on the one hand, and an assignee of all the property of the debtor for the benefit of all his creditors, *pro rata*, upon the other hand. No proceedings have been instituted under the United States Bankrupt Law. The case presents, then, very fairly, the single question, whether the enactment of the Federal Bankrupt Law operated to nullify, supersede, or suspend all the State Insolvent Laws? The District Court held that it did.

The authorities are in conflict, and we state briefly the following cases under the Bankrupt Law of 1867: *Sedgwick, As-*

* Iowa Reports, Stiles, *Vol.* XXXVII., p. 209.

signee, v. *Place*, 1 N. B. R., 673, before Justice Nelson, in Circuit Court of Southern District of New York; the debtors had made an assignment under the New York Insolvent Law, and were afterwards declared bankrupts; the assignment was held valid, and the court refused to order assignees under the State law, to turn the property over to the assignees in bankruptcy, thus recognizing the continued force and vitality of the State law. Substantially to the same effect is the case of *Sedgwick, Assignee*, v. *Minck et al.*, decided by the same court and by Justice Nelson, 1 N. B. R., 675. So, also, *In re* Hugh Campbell, 1 N. B. R., 165, decided in United States District Court of Pennsylvania, Western District, by McCandless, J.; also *In re* Wm. Burns, decided by same court, 1 N. B. R., 174. *In re* George A. Hawkins, *et al.*, in Supreme Court of Connecticut, 2 N. B. R., 378, it was *held*, that a voluntary assignment by a debtor under the Insolvent Law of the State was valid, although the United States Bankrupt Act was in existence and applicable to the case at the time of the assignment. Opinion by Carpenter, J., concurred in by the whole court. *Langley* v. *Perry*, 2 N. B. R., 596, was a case in the United States Circuit Court, Southern District of Ohio, before Justice Swayne, on appeal from the decision of Leavitt, District Judge, and in which the judgment of the United States District Court, holding that when an assignment was made under a State Insolvent Law, and the debtor was shortly afterwards forced into bankruptcy, that the United States courts could rightfully take jurisdiction of the whole matter, was reversed. See the case as decided by Judge Leavitt. *Perry* v. *Langley*, 1 N. B. R., 559; and in *Clark* v. *Bininger*, 3 N. B. R., 518, which was a case in the Superior Court of New York, it was *held*, that when the jurisdiction of the State court had attached and the property had passed into the hands of a receiver, under its order, the jurisdiction was not disturbed by a subsequent adjudication of bankruptcy of the parties, and that the title of the receiver is superior to that of the assignee in bankruptcy. See, also, as sustaining the jurisdiction of the State courts, Appeal of *Creig, Riddle, and John Hunter, etc.*, Supreme Court of

Pennsylvania, May, 1871, Vol. I. (N. S.); Vol. XVIII. (O. S.), 302; Pittsburg Legal Journal of date June 28, 1871, Section 2. *Cole* v. *Duncan*, in Supreme Court of Illinois, 3 Chicago Legal News, 323 (July 8, 1871).

On the other hand, the following cases hold very squarely that the exercise by Congress of its constitutional power to enact a uniform system of bankruptcy, repeals the Insolvent Laws of each particular State. *Meekins, Kelly & Co.* v. *Their Creditors*, in Supreme Court of Louisiana, 19 La., 497; S. C., 3 N. B. R., 511; *Thornhill* v. *The Bank, etc.*, in the United States District Court for Louisiana, Durell, J., 3 N. B. R., 435; *Day* v. *Bardwell*, in Supreme Court of Massachusetts, 27 Mass., S. C., 3 N. B. R., 455; *The Commonwealth* v. *O'Hara*, in District Court of Alleghany county, Pennsylvania, Williams, J., 1 N. B. R., 86; *Martin* v. *Berry*, in Supreme Court of California, 2 N. B. R., 629; *Van Nostrand* v. *Barr*, in Court of Appeals of Maryland, 2 N. B. R., 485; *Cassard* v. *Kroner*, in City Court, Baltimore, Maryland, 4 N. B. R.

The same conflict existed during the continuance in force of the United States Bankrupt Law of 1841. See, as maintaining that the State laws were still in force and operative, *Zeigenfuss' Case*, 2 Iredell's Law (N. C.), 463; *Clark* v. *Rist*, 3 McLean, 494; and in James' Bankrupt Law, p. 9, it is said that, since the law of 1841, it has been held that a State Insolvent Law may exist in full vigor so far as it does not impede the operation of the Bankrupt Law of Congress.

On the other hand, it was *held*, that the taking effect of the National Bankrupt Law of 1841, *ipso facto*, suspended the State Insolvent Laws. *Ex parte* Eames, 2 Story's C. C., 322; *Blanchard* v. *Russell*, 13 Mass., 1; *Griswold* v. *Pratt*, 9 Metc. 16, and several other cases referred to in them.

This question can only be determined authoritatively by the Supreme Court of the United States. It has already undergone elaborate and exhaustive discussion by the courts, in determining the cases cited *supra*, and it is needless for us to further discuss it here. In our view, the weight of authority under the law of 1867, is in support of the exercise of juris-

diction under the State laws, certainly until the jurisdiction of the Federal courts has been called into exercise; and, therefore, that the National Bankrupt Law does not wholly suspend the State laws. We also think this sound in principle, and conducive to the economical and speedy administration of justice.

Reversed.

DAY, Ch. J., dissenting.

SUPREME COURT—MICHIGAN.

It is no defense to an action on a promissory note that it was given and accepted in payment for a precedent debt, with knowledge on the part of the creditor receiving the note, that his debtor was insolvent; that such note was given with a view to prefer this creditor; and that the debtor was soon after the giving of the note adjudicated a bankrupt.

The payments the law makes void are those which reduce the means of the debtor to pay his debts ratably; a change in the form of his own obligation from an account to a note, although indorsed, could not have that effect, and works no wrong to the other creditors.

EDWARD O'CONNOR *v.* WILLIARD PARKER *et al.**

COOLEY, J.—This appears to be a writ of error upon a judgment rendered against O'Connor in the court below, as indorser of a note made by McKinney & Co. The sole defense is that the note was given by McKinney & Co., and accepted by the Parkers in payment for a precedent debt, with knowledge on part of all parties that McKinney & Co. were insolvent; that the giving of the note was with a view to prefer the Parkers as creditors; that McKinney & Co. were soon after proceeded against in bankruptcy, and were actually declared bankrupts; and that by reason of these facts the note and indorsement thereof were altogether void. The Circuit Court held these facts to constitute no defense, and we see no ground for questioning the conclusion.

The argument of the plaintiff in error is, that Section 35 of the Bankrupt Law makes certain payments void when made to

* Michigan Rep., 23, p. 23.

prefer a creditor or to defeat the policy of the act; and the giving of this note, it is said, is such a payment. We do not think so. The payments the law makes void are those which reduce the means of the debtor to pay his debts ratably. A change in the form of his own obligation from an account to a note could not have that effect; neither could the accommodation-indorsement with which a friend might favor him. These circumstances work no wrong to the creditors, and are, therefore, not within the evils this section of the law had in view.

Waiving all consideration of the other infirmities, which we think are obvious in the case on the defense, an affirmance of the judgment is ordered.

The other justices concurred.

SUPREME COURT—CALIFORNIA.

A creditor who has proved his debt in the bankruptcy proceedings, cannot maintain an action on the same demand against the bankrupt. His right of action in the State court as well as in the Federal courts is thus waived.

It is the intent of the Bankrupt Act of 1867, that the Federal tribunals shall have exclusive control of the assets of the bankrupt, and shall distribute the proceeds among his creditors.

JOHN WILSON *v.* M. CAPURO AND G. CAPURO.*

BY THE COURT, RHODES, C. J.—This action was brought on a promissory note. The defendants, among other defenses, alleged that they, as partners, commenced proceedings in bankruptcy; that they were duly adjudged bankrupts; that the proceedings are still pending; and that the plaintiff appeared in those proceedings and proved the indebtedness of the defendants to him on the note in suit. The demurrer which was interposed to this defense, raises the only question in the case.

It is provided by Section 21 of the Act of 1867, to establish a

* Cal. Rep., 41, p. 545.

uniform system of bankruptcy thoughout the United States (14 U. S. Stats., 526), "that no creditor proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor, against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt," etc. It is clear, from this provision, that a creditor who has proved his debt in the bankruptcy proceedings, cannot maintain an action on the same demand against the bankrupt. His right of action in the State court, as well as in the Federal courts, is waived. The purposes of the act would, in a measure, be defeated, were the creditor to be permitted to recover a judgment on his debt, after having proved it in the bankruptcy proceedings.

It is the intent of the act that the Federal tribunals shall have exclusive control of the assets of the bankrupt, and shall distribute the proceeds among his creditors. A judgment in a State court, on a debt which has been proved in the proceedings in bankruptcy, would be useless unless it gave the creditor some lien or priority that he otherwise would not possess, or enabled him to enforce the payment of the judgment without regard to the proceedings in bankruptcy. A discharge in bankruptcy would be no relief to the debtor, if the creditor, after participating in those proceedings, were entitled to maintain an action on his debt.

No question arises in the case, as to whether a creditor can maintain an action, when the debtor has unduly delayed in procuring his discharge, or when the discharge has been denied, or when he has been guilty of fraud in the proceedings in bankruptcy; for no facts of that character are alleged or proved.

Judgment affirmed.

UNITED STATES DISTRICT COURT—CALIFORNIA.

The jurisdiction of the ordinary tribunals over suits to which the bankrupt is a party, is not taken away by mere force of the adjudication; but the Bankruptcy Court has jurisdiction to suspend or control such proceedings, by acting on the parties.

In the absence of such interference, the jurisdiction of the State courts remains unimpaired, and their decrees and judgments are valid and effectual.

In re Irwin Davis.*
In Bankruptcy.

Hoffman, J.—In this case, a temporary injunction was granted, on the petition of the assignee, against certain creditors of the bankrupt, restraining them from prosecuting a suit commenced by them in the Fifteenth District Court, to foreclose a mortgage by them as security for a debt. A rule was also entered, requiring them to show cause why a perpetual injunction should not issue as prayed for by the assignee. On the return day of this rule, the parties appeared, and the questions presented by the case were elaborately argued.

The ground on which the assignee desires the interposition of the court is, that it will be for the interest of the estate that the mortgaged property be sold at private sale, subject to the mortgage, and by this means the sum of one thousand five hundred dollars, stipulated in the mortgage, to be paid as attorney's fees in case of foreclosure, may be saved. It is suggested, on the other hand, that the property is subject to various liens subsequent to that of the mortgage—that these liens are held by private parties absent from the State, and not within reach of the process of this court; and that, to foreclose and cut off these liens and make a clear title to the purchaser, they must be brought in by publication and constructive service, as provided for by the laws of this State.

The amount of the debt and the validity of the lien of the mortgage are not contested; nor is it suggested that any unfair advantage is sought by the proceedings in the State court.

The right of the mortgagees to the benefit of their security being thus undisputed, and no application being made to compel the creditors to come into this court to enforce the claims, there would seem to be no reason for staying the proceedings in the State court, unless the property is about to be immediately sold at a sacrifice.

* Sawyer's N. S. R., 9th Circuit, p. 260.

But of this there is no apprehension. The notices, etc., by publication, will require at least six weeks, and the defaults of absent parties, and a decree of foreclosure, order of sale, etc., cannot probably be entered in less than two months. During all this time the proceedings will be under the control of this court, and if the assignee finds an opportunity to make an advantageous sale, he can apply to the court for leave to do so. If the sale be really advantageous the creditors will have no motive to resist it, their only object being to collect their debt.

It will, perhaps, be found better for the interests of the estate to suffer the foreclosure suit to proceed in any event. For the proposed purchaser could bid at the sale, receive a clear title from the sheriff, disencumbered of all junior liens in the hands of all persons properly made parties to the suit; and the assignee, and even the mortgagees, if desired, might unite in the deed. The title being thus made perfect, it is to be presumed that the largest possible price would be obtained.

But whatever course it may hereafter be deemed advisable to adopt, I see no reason for now arresting the proceedings of the creditors.

The temporary injunction heretofore issued will therefore be dissolved—but with the reservation to this court of full power and authority to interfere, and to control or arrest the proceedings whenever it shall appear expedient for the interests of all concerned that it should exercise the power given to it by law, to assume the exclusive administration of this portion of the bankrupt's estate.

As this disposition of the matter is understood to be satisfactory to the assignee, it is perhaps unnecessary to consider the question raised at the hearing. But as the counsel have agreed to those questions at length, and have requested of the court an expression of its opinion, I shall proceed to state the conclusions to which I have arrived.

It is contended that the Court of Bankruptcy has not only complete jurisdiction over the estate of the bankrupt, and the authority to determine all cases and controversies, between the bankrupt and his creditors, to ascertain, liquidate, and enforce

liens, to adjust priorities and conflicting interests of parties, to marshal and dispose of and distribute assets, etc., etc., but that this authority is exclusive, and that the adjudication in bankruptcy, *proprio vigore*, divests the ordinary tribunals of all jurisdiction over the bankrupt or his estate, and that all further proceedings before those tribunals are *coram non judice*, and void, notwithstanding that the Court of Bankruptcy has refused to enjoin the parties from further proceedings in them, and notwithstanding that it may clearly be most just, convenient, and for the interests of all parties that the suit before the ordinary tribunals should be prosecuted to a final judgment.

I am clearly of opinion that this view cannot be sustained, and that it is not the intention of the act to deprive the court of the right to avail itself of the aid of the ordinary tribunals whenever convenience and the interests of the parties may require.

There is, unquestionably, much force in the criticisms contained in the dissenting opinion of Catron, J. in the case of *ex parte* Christy, and *Norton's assignee* v. *Boyd* (3 How., 322 and 347). In the former case the Supreme Court sustained the jurisdiction of the District Court to entertain a bill to set aside a sale under a decree of foreclosure rendered in the State court before the adjudication in bankruptcy.

Mr. Justice Catron contends that such a proceeding could only be sustained on the ground that the sale under the decree of foreclosure was absolutely void, and that the mortgage lien on which the decree was entered could be enforced only in the Bankruptcy Court. If this be the true construction of the opinion of the Supreme Court, it would go far to sustain the proposition contended for in this case, viz., that the adjudication in bankruptcy absolutely divests the ordinary tribunals of jurisdiction over all matters cognizable in the Bankrupt Court. But, in the succeeding case of *Norton's assignee* v. *Boyd*, clearly shows that the court did not intend to so decide. In that case, as in the former, a decree of foreclosure had been obtained, and execution issued and levy made, before the adjudication in bankruptcy.

The sale took place after the adjudication. The assignee

filed his bill to set aside this sale on the ground that the District Court of the United States was, by the Bankrupt Law, vested with exclusive jurisdiction over all matters pertaining to the settlement of the affairs of the bankrupt, and that the sale made by the State court had transferred no legal title to the property, which still remained that of the bankrupt or his assignee, to be sold or otherwise disposed of under the orders of the District Court.

It will be perceived that the question is thus distinctly raised, whether, after the adjudication, the proceedings in a State court to enforce a lien were void, and whether the jurisdiction of the Bankrupt Court was exclusive.

The Circuit Court dismissed the bill for want of equity, and the Supreme Court, on appeal, affirmed the decision.

In the opinion of the Circuit Court, which is approved and adopted by the Supreme Court, the opinion is expressed that, on the ground of expediency, the jurisdiction of the Bankruptcy Court should be exclusive, so as to take away from the Supreme Court any jurisdiction in such cases. As to this, the Supreme Court says: "Upon this subject it is not our province to decide, and we have no desire to express an opinion upon it."

Mr. Justice Catron contends that this decision is inconsistent with the previous decision in *ex parte* Christy. However this may be, the case is a direct authority for the position that a sale made after an adjudication in bankruptcy, under a decree of a State court to enforce a lien, is not void—and to be treated as such, in all cases, by the Bankruptcy Court. And, further, that the Supreme Court declines to express an opinion whether, on grounds of expediency, the jurisdiction of the District Court should have been made, by laws, *exclusive*. That such was the understanding of the court in *ex parte* Christy, appears from the language of Mr. Justice Story, in delivering the opinion of the court: "It is further objected that if the jurisdiction of the District Court is as broad and comprehensive as the terms of the act justify, according to the interpretation here insisted on, it operates, or may

operate, to suspend or control all proceedings in the State courts, either then pending or thereafter to be brought by any creditor or person having an adverse interest, to enforce his rights or to obtain remedial redress against the bankrupt or his assets after the bankruptcy. We entertain no doubt that under the provisions of the 6th Section of the act, the District Court does possess full jurisdiction to suspend or control such proceedings in the State Courts, not by acting on the courts, over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity, upon due application made by the assignee, and a proper case being laid before the court, requiring such interference. Such a course is very familiar in Courts of Chancery, in cases where a creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the court, for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy, and they were, without doubt, in contemplation of Congress, as indispensable to the practical working of the bankrupt system. But, because the District Court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should be, in all cases, absolutely exercised. On the contrary, where suits are pending in the State courts, and there is nothing in them which requires the equitable interference of the District Court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments, especially where there is no suggestion of fraud or injustice on the part of the plaintiffs in those suits. The act itself contemplates that such suits may be prosecuted and further proceedings had in the State courts, for the assignee is, by the 3d Section, authorized to sue for and

defend the property vested in him under the bankruptcy, subject to the orders and directions of the District Court; and all suits at law and in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to a final conclusion in the same way and manner, and with the same effect, as they might have been by the bankrupt." "So that here the prosecution and defense of any such suits in the State courts is obviously intended to be placed under the discretionary authority of the District Court; and, in point of fact, as we all know, very few, comparatively speaking, of the numerous suits pending in the State courts at the time of the bankruptcy, ever have been interfered with, and never unless some equity intervened which required the interposition of the District Court to sustain or protect it." The Act of 1867 gave a legislative sanction to this exposition of the duties and jurisdiction of the District Courts in bankruptcy, and the language of the Supreme Court is adopted and embodied in the act.

Congress must also have been aware of the suggestion of the Circuit Judge in *Norton's assignee* v. *Boyd*, that, on grounds of expediency, the jurisdiction of the District Court ought to be exclusive; a suggestion which the Supreme Court declined to approve. But the act contains no provision to the effect suggested by the Circuit Judge, and it is evident that it was intended to leave the jurisdiction as it stood under the Act of 1841, as expounded by the Supreme Court.

The provision in the 14th Section, which authorizes the assignee to prosecute and defend all suits pending at the time of the adjudication, in which the bankrupt is a party, is inconsistent with the idea that, by the adjudication, the ordinary tribunals are divested of all jurisdiction over the bankrupt or his estate—while to attribute such an effect to the adjudication would be productive of extreme hardship and injury to the bankrupt, or it might to strangers in no way connected with him.

At the time of the bankruptcy, suits may be pending to determine the title to land, to enforce trusts, to foreclose mort-

gages, to effect partitions, to take accounts of partnerships, to remove clouds from titles, etc., etc., to which the bankrupt was a necessary or indispensable party. The litigations may have been protracted and expensive. To hold that by the fact of adjudication, all power of the ordinary tribunals to bind the bankrupt or his estate by a final judgment or decree in any such suits is taken away, would be to subject the parties to an intolerable hardship, for no conceivable object. Nor is it clear what relief could be afforded by the Bankruptcy Court, for the property in litigation might be in another district, and beyond the jurisdiction of the court, and the parties might have no connection with the bankrupt either as debtors or creditors, and thus be in no way concerned in the bankruptcy proceedings.

In the case of *Sedgwick* v. *Menck et al.* (1 N. B. R., 673), where the bankrupt had, long previously to the passage of the act, made an alleged fraudulent assignment of his property, and creditors had filed bills to set aside the assignment, which suits were pending at the time of the bankruptcy, Justice Nelson refused to interfere, observing, that the question involving "the right to the property is in the State court, where it belongs, and the decision of that court will be conclusive upon the right. If in affirmance of the judgment of the court below, the property will be applied to the satisfaction of the judgments on the creditors' bill; if in favor of the validity of the assignment it will take the direction of the trusts created in the assignment. The right to this property attached long before the assignment in bankruptcy, and before even the passage of the Bankrupt Law." This case affords a striking illustration of the injustice and inconvenience of an opposite doctrine.

The provision in the 21st Section, that no creditor whose debt is provable under the act shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, was evidently intended merely to subject such suits to the control of the Bankruptcy Court, and to enable that court to stay them "whenever required, to prevent mis-

chief or wrong to other creditors or, waste or misplacement of assets." But it was not intended to declare, that the adjudication in bankruptcy *proprio vigore* should divest the ordinary tribunals of jurisdiction, and all subsequent proceedings should be *coram non judice* and void, even when taken with the assent of the Bankruptcy Court, and when clearly necessary to protect and enforce the rights of third parties.

The provision that the suit shall be stayed by the Bankruptcy Court *until the determination of the question of discharge, provided there be no unreasonable delay* on the part of the bankrupt in endeavoring to obtain his discharge, and provided, that if the amount due the creditor is in dispute, the suit may, by leave of the Court in Bankruptcy, proceed to judgment for the *purpose of ascertaining* the amount due, clearly indicate that Congress did not intend to divest, in all cases, the ordinary tribunals of jurisdiction, after an adjudication in bankruptcy; and the provision authorizing the assignee to defend all suits pending against the bankrupt, shows that it was contemplated that such suits might be continued and carried to judgment after the adjudication and appointment of an assignee.

On the whole, my opinion is, that the jurisdiction of the ordinary tribunals over suits to which the bankrupt is a party, is not taken away by mere force of the adjudication; that the Bankruptcy Court has jurisdiction to suspend or control such proceedings, by acting on the parties; but that in the absence of such interference, the jurisdiction of the State courts remains unimpaired, and their decrees and judgments are valid and effectual.

Thompson & Wilson, attorneys for bankrupt.
Hambleton & Gordon, attorneys for assignee.
W. W. Cope, attorney for respondent.

SUPREME COURT—MARYLAND.

A recovered a judgment in a certain suit prior to his being adjudged a bankrupt. This judgment was amended, after the adjudication and conveyance of A's property to the assignee, by order of the court in which the action was brought, so as to increase, slightly, the amount of the original judgment.

A's assignee brought suit to recover on this judgment, but his right to maintain the action was denied on the ground that the judgment being entered subsequent to the assignment, was the property of the bankrupt.

Held, that the cause of action and original judgment were clearly antecedent to the application in bankruptcy, and the assignment to the assignee, and as such passed by operation of law to him, subject to all the rights of the bankrupt to have it altered and corrected.

That the right of the assignee to maintain this action does not depend on the instrument of assignment, as the Bankrupt Act of 1867 provides that all *choses in action*, all debts due, etc., together with the right to sue, shall, in virtue of the adjudication, and the appointment of the assignee, be at once vested in such assignee.

FRANK ZANTZINGER *v.* F. I. RIBBLE, *Assignee in Bankruptcy of* JOHN C. DEYERLE.*

BOWIE, J., delivered the opinion of the court.

The appellee, *as assignee of* John C. Deyerle, a bankrupt, sued the appellant on the 1st of March, 1870, in the Superior Court of Baltimore, in an action of debt, on two judgments of the Circuit Court of the city of Norfolk, Virginia, which were set out originally in two counts; the first declaring on a judgment obtained by the bankrupt before his application, viz.: on the 8th of July, 1867, against the defendant, for one hundred and fifty-three dollars, and two dollars and sixty-seven cents charges of protest, with interest and costs.

The second, declaring on a judgment obtained by the bankrupt, before he became bankrupt, in said court, on the 8th of July, 1867, for two hundred and forty-two dollars and eighty-five cents damages, with interest and costs.

By leave of the court the *var.* was afterwards amended by adding a third count, declaring on judgment of said court obtained by the bankrupt (before he became such), on the 22d of April, 1870, for the sum of one hundred and fifty-three dol-

* Maryland Rep., 36, p. 33.

lars, and two dollars and sixty-seven cents, charges of protest, with interest and costs.

The appellant filed six pleas (the second and fourth of which were withdrawn), leaving the following, on which issues were joined: 1st. *Nul tiel* record. 3d. That the alleged judgments were illegally obtained. 5th. That the defendant paid the said Deyerle, before he became bankrupt, the full amounts of said judgments and costs. 6th. That after the recovery of the said alleged judgments and before the institution of this suit, the said Deyerle, before he became bankrupt, released to the defendant the amount alleged to have been recovered in said judgments.

The appellee offered in evidence transcripts of records of the Circuit Court for Norfolk City, Va., duly authenticated, as described in the second and third counts.

The record offered under the third count, showing a judgment entered originally on the 8th of July, 1867, for one hundred and three dollars, and two dollars and sixty-seven cents charges of protest, etc., and afterwards, by order of the court, on the 22d of April, 1870, amended and entered for the sum of one hundred and fifty-three dollars and seventy-eight cents, and two dollars and sixty-seven cents charges of protest, interest, and costs.

The appellee then further to maintain the issue upon his part, and to prove that the estate of said J. C. Deyerle, real and personal, had been legally assigned to him, as assignee in bankruptcy, offered in evidence the following paper writing:

"In the District Court of the United States for the District of Virginia,

In the matter of J. C. DEYERLE, Bankrupt, } ss.
District of Virginia. }

In Bankruptcy.

Know all men by these presents, that F. I. Ribble, of the ——— of ———, in the county of Roanoke and State

of Virginia, in said district, has been duly appointed assignee in said matter.

Now therefore I, John C. Underwood, judge of said district, by virtue of the authority vested in me by the 14th Section of the Act of Congress, entitled, "An Act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867," do hereby convey and assign to the said F. I. Ribble, assignee as aforesaid, all the estate, real and personal, of the said John C. Deyerle, bankrupt aforesaid, including all the property of whatever kind of which he is possessed, or in which he was interested or entitled to have, on the 31st of December, 1868, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of the 14th Section of said Act.

To have and to hold all the foregoing premises to the said F. I. Ribble, and his heirs forever; in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

Witness the Honorable John C. Underwood, Judge of the said court, and seal thereof, at Richmond, Virginia, on the 15th day of June, A. D. 1869.

Seal.

E. J. UNDERWOOD,
Clerk of District Court for said District.

OFFICE U. S. DISTRICT COURT,
District of Virginia.

I, Edward J. Underwood, Clerk ot the U. S. District Court of Virginia, do certify that the within is a true and correct copy of the original assignment *not* on file in this office. Given under my hand and seal of the court, this 19th day of October, A. D. 1869.

Seal.

ED. J. UNDERWOOD,
District Clerk."

The defendant objected to the admissibility and competence in evidence of the said paper for said purpose, and to its being

read to the jury; but the court overruled the objection, and permitted it to be read to the jury as evidence for the purpose aforesaid, whereupon the defendant excepted.

The appellant's counsel, in his brief contends that, the evidence being offered for the purpose of maintaining the issue generally on the part of the plaintiff and to prove the assignment, it should have been rejected if inadmissible for either purpose; and insists it was not admissible generally on the third count, because the assignment, if valid as such, was prior to the date of the judgment as described in the third count, the former being made on the 15th of June, 1869, and the judgment on the 22d of April, 1870: the latter being subsequent, was not conveyed by the assignment, but was the property of Deyerle.

The transcript of record shows that the suit in which the judgment was entered, was commenced on the 18th of September, 1861, on a promissory note of the appellant to the bankrupt, dated the 2d of April, 1861, for one hundred and fifty-three dollars and seventy-eight cents, on which the original judgment for one hundred and three dollars and seventy-eight cents was entered on the 8th of July, 1867, and afterwards by order of the court, passed the 22d of April, 1870, the judgment was amended and entered for the sum of one hundred and fifty-three dollars and seventy-eight cents, etc.

The cause of action and original judgment were clearly antecedent to the application in bankruptcy and assignment, and as such passed by operation of law to the assignee, subject to all the rights of the bankrupt to have it altered and corrected.

The subsequent action of the court increasing the amount of the judgment, did not in any manner impair the right or obligation of the assignee to sue for and recover the amount as finally ascertained.

The second point of objection, that the paper excepted to was not admissible as evidence, because the 14th Section of the Bankrupt Law requires the judge or Register, "by an instrument under his hand," to convey, etc., is not, in our opinion, more tenable than the first.

Although the Act of Congress prescribes that as soon as the assignee is appointed and qualified, the judge or Register shall by an instrument *under his hand*, assign and convey to the assignee all the estate, real and personal, of the bankrupt; yet this provision must be regarded as directory and not essential to the assignment, where some equally formal mode has been adopted, sanctioned by the seal of the court, which imports verity, and gives authenticity to all the judicial acts of the judge.

The right of the appellee to maintain his action, did not depend on the instrument of assignment. The Bankrupt Act expressly enacts that all *choses in action*, all debts due the bankrupt, all causes of action, "which like right, title, power and authority to sell, manage, dispose of, sue for, and recover the same as the bankrupt might, or could have had, if no assignment had been made, *shall in virtue of the adjudication of bankruptcy, and the appointment of his assignee be at once vested* in such assignee." Bankrupt Act, Section 14; Bump's Law and Practice of Bankruptcy, 37.

It is also enacted that "in suits prosecuted by the assignee, a certified copy of the assignment made to him by the judge or Register, shall be conclusive evidence of his authority to sue." Bankrupt Act, Section 16; Bump's Law and Practice of Bankruptcy, 42.

The instrument of the assignment offered in evidence being certified by the Clerk of the District Court, under the seal of his court, to be a true copy of the original assignment on file in his office, the same is sufficient to show the assignee's right to sue. Independently of these provisions, the right of the assignee to sue was not put in issue by any of the pleas, but, on the contrary, the bankrupt was expressly admitted, and it was not incumbent upon the plaintiff to prove the assignment; so that the admission of the paper, if erroneous, did not injure the appellant. The judgment below is therefore affirmed.

Judgment affirmed.

UNITED STATES DISTRICT COURT—CALIFORNIA.

It is the duty of the court, when the acts of bankruptcy are imperfectly alleged, but clearly established by the proof, to allow such amendment of the creditor's petition as may be necessary to sustain the proceeding.

Order entered, allowing the amendment of the petition by alleging further acts of bankruptcy, and further ordering an adjudication of bankruptcy when this amendment has been made.

In re A. B. GALLINGER.*

In Bankruptcy.

HOFFMAN, J.—A petition having been filed against the above-named party, praying that he be adjudged an involuntary bankrupt, the matter was referred to the Register, to take proofs, and report the same, with his opinion, to the court. The report has accordingly been made, and the case now comes up on exceptions filed on behalf of the alleged bankrupt.

The facts, as disclosed by the proofs, seem sufficiently plain. Towards the end of the year 1868, Gallinger, who was a wholesale dealer in wines and liquors, in the town of Oroville, procured from various persons in this city, goods to the amount of ten thousand dollars. What representations he made as to his means of payment does not appear; but he admits that he stated that he had ten thousand dollars in notes due to him from Chinamen. He denies that he said they were good, but unless he meant it to be so understood, it is difficult to imagine his motive for making any statement on the subject.

Towards the end of December, he wrote to his creditors in this city that he was unable to meet his liabilities, and advised them to send to Oroville to collect what they could. His whole stock of goods remaining in his store at this time was worth only four thousand dollars, including the furniture and fixtures.

On the 30th or 31st of December, an attachment was levied, on behalf of Wurmser, one of his San Francisco creditors, on this stock. On the same day, at an earlier hour, an attachment had been levied on the same goods, for a small sum, at the suit of one Brock, a creditor in Oroville. At the solicitation of

* U. S. Rep., 9th Cir., p. 224.

Brock, who admits that he was apprehensive that his lien might be defeated by proceedings in bankruptcy, he signed a paper which is not produced, but which authorized a judgment to be entered up against him at once, and before the time for answering had expired or his default was due.

The goods were subsequently sold under this judgment and that obtained under the San Francisco attaching creditor.

The only account given by Gallinger of the proceeds of the goods bought by him in San Francisco is, that he paid to one Kasel, three thousand dollars; to Marks, one thousand dollars; to Raymond, about one thousand seven hundred and fifty dollars, and to other persons, from one to two hundred dollars. He also sold to Marks some book-accounts, admitted to be good, to the amount of two hundred dollars.

Both Kasel and Marks are brothers-in-law of the alleged bankrupt.

He asserts that the debts due them was for money loaned. But these debts were not entered in his books. They were noted, as he says, in a memorandum-book which he has lost; nor is Marks able to produce the books in which the amounts loaned to Gallinger or paid by him are entered. The notes due from the Chinamen seem to be nearly worthless.

The respondent does not deny that he is now hopelessly insolvent, and he admits that his pecuniary condition has not altered since the time when he made the payments above referred to, and certain transfers or sales of real estate spoken of in his deposition.

The facts of the case thus seem to be that he has converted into cash the greater part of the goods obtained by purchase in this city, and applied the proceeds to the payment of certain alleged debts due to creditors in Oroville, who were to a considerable extent his relatives. That at the time he made these payments he knew himself to be insolvent; and that he intended to protect them at the expense of his other creditors is, I think apparent.

As far as can be ascertained, the payments were made in the months of October, November, and December, and up to the

very time of the attachments. He could not have failed to know what was the probability of his obtaining the payment by the Chinamen of the notes held by him, and which, with his stock of goods, comprised nearly the whole of his available assets; and when he devoted the proceeds of so large a part of his stock of goods, for which he was indebted to the amount of ten thousand dollars, less only the sum of fifty dollars, which he had paid, to the payment of the debts said to be due to his relatives and friends, he must have been aware that he was giving those creditors a preference, in direct violation of the Bankrupt Act.

The attachment by Wurmser, he admits that he not only suffered, but procured—for it was levied at his suggestion, and in consequence of letters advising his San Francisco creditors of the state of his affairs.

But this information he did not see fit to give them until after he had paid some six thousand dollars to his preferred creditors in Oroville.

He denies that the attachment by Brock was procured by him.

If the word "suffer," in the 39th Section, has any meaning or operation beyond that of the word "procure," it is clear that the bankrupt in this case *suffered* his property to be taken by Brock on legal process. (*In re* Black & Secor, 1 N. B. R., 351; *in re* Craft, 1 N. B. R., 379; *in re* Sutherland, 1 N. B. R., 531; *in re* Dibble, 2 N. B. R., 617; *in re* Schick, 1 N. B. R., 177; *in re* Haughton, 1 N. B. R., 460.

But at all events the confession of the judgment by the bankrupt, when he knew himself to be insolvent, and with the intent to enable Brock to secure his debt, by converting his lien by judgment, execution, and levy, and thereby obtain a preference over other creditors, was clearly an act falling within the terms and spirit of the Bankrupt Law.

The sale of the book accounts to Marks, would seem also to be an act of bankruptcy. It was not done in the ordinary course of business, but, as he says, to obtain money to pay debts—and this at a time when he knew himself to be insolvent. The moneys obtained from Marks he must have applied

to the payment of creditors, whose claims he preferred and satisfied, in clear violation of law.

The facts as developed by the proofs were evidently imperfectly known to the creditor by whom the petition was filed. I think, however, that the second and third specifications are sustained. If necessary, the petition may be amended; for it is the duty of the court, when acts of bankruptcy are clearly established, and especially in a case like this, where something more than a mere technical violation of the law may be suspected, to allow such amendments and further allegations to be made as may be necessary to sustain the proceedings.

The exceptions to the report of the Register are overruled. The petitioning creditor has leave to amend his petition, by alleging further acts of bankruptcy, and on his doing so, an order adjudging the respondent an involuntary bankrupt may be entered.

INDEX.

ACT OF BANKRUPTCY.

1. A debtor will not be adjudicated a bankrupt simply because, after selling his property for the purpose of going into a new business enterprise, he does not put the proceeds into a tangible shape to prevent the same being seized on process issued out of a State court. Petition dismissed. *Fox* v. *Eckstein*, 373.
2. An act of bankruptcy committed a long time before the passage of the United States Bankrupt Act of 1867, is no ground for refusing a discharge. *Keefer*, 389.
3. Where a stock of goods was sold to a *bona fide* purchaser, and where there is no evidence that the vendor was insolvent at the time of the sale; but it appearing on the trial that the purchaser had previously tried to buy the stock, and that the vendor had refused, but finally sold out because he wished to change his business,

Held, that an adjudication would not be made on an involuntary petition, setting up the sale of the stock as the only act of bankruptcy. *In re Valliquette*, 307.

4. See *Porter et al.* v. *James H. Coggeshall, Trustee*, 73.

ADJUDICATION.

By an adjudication of bankruptcy under the Bankrupt Act (United States Statutes, 1867, C. 176), even when the proceedings were begun on the debtor's voluntary petition, his property becomes exempt from subsequent attachment on mesne process. *George W. Williams* v. *Charles Merritt*, 706.

ADVANCED BID.

The creditors who applied to set aside the sale, having in such application offered to bid on a resale, a specified sum more for the property than it was sold for, were held to be bound to fulfill their offer. *In re The Troy Woolen Company*, 629.

AFFIDAVIT.

See *Moore et al.* v. *Harley*, 242.

AGENTS' KNOWLEDGE.

When one constituted attorney for the collection of a debt procured from the debtor a judgment note for the amount in his own name, and entered it, knowing that the debtor was insolvent, there being a clear in-

tent to give a preference within the meaning of the act, though the fact of insolvency was not directly known to the real creditors, such knowledge is imputable to them and the judgment is invalid. *Vogle* v. *Lathrop*, 439.

AGREEMENT.

Where money was deposited in court to the credit of a person against whom a warrant for adjudication of bankruptcy had been issued, and the funds had thereby been lodged in court without prejudice to the rights of creditors or of a mortgagee, the legal intendment of such deposit would be that the rights of the assignee on the one side, and of the mortgagee on the other, should be adjudicated according to the law and the usage of the court. *Masterson*, 553.

AMENDMENT.

1. Although the court has, in furtherance of justice, the discretion at any stage of proceedings to permit amendments to be made to pleadings, it is a discretion properly limited to the same cause of action, and it should not permit, under forms of "amendments," new causes of action to be introduced.
2. Amendments in legal proceedings always presuppose something to amend —something in the record concerning that distinct substantive matter —not an entirely new cause of action to be substituted for the original one. Substitution is not amendment. *Leonard*, 562.
3. The deposition of a witness to acts of bankruptcy in an involuntary proceeding cannot be amended, because it is the proof upon which the rule to show cause issues, and without which the whole proceeding is defective. *May* v. *Harper & Atherton*, 478.
4. It is the duty of the court, when the acts of bankruptcy are imperfectly alleged, but clearly established by the proof, to allow such amendment of the creditor's petition as may be necessary to sustain the proceeding.

Order entered, allowing the amendment of the petition by alleging further acts of bankruptcy, and further ordering an adjudication of bankruptcy when this amend has been made. *In re A. B. Gallinger*, 729.

5. See *Moore et al.* v. *Harley*, 242.

APPEAL.

1. Where no bond has been filed in a case of appeal, as required by Section 8 of the United States Bankrupt Act of 1867, no appeal can be allowed after the expiration of ten days from the entry of the decree.

Where, however, the bond is proper in form, and the sureties are sufficient, the United States District Court will approve it as a bond which would be a proper one if given in time, leaving it to the appellee to move the appellate court to dismiss the appeal if such a course shall seem proper to him. *Benjamin* v. *Hart*, 408.

2. In computing the time within which an appeal in bankruptcy must be taken, Sunday is to be counted, except that when the last day would fall on Sunday, that Sunday is to be excluded.

The decision of a District Court, sitting in bankruptcy, upon an application

to confirm a sale made of a bankrupt's estate, is not a matter within the general supervisory jurisdiction conferred by Section 2 of the Bankrupt Law of 1867, 14 Stat. at L., 520, upon the Circuit Courts. *York & Hoover*, 479.

8. In an appeal by a creditor from the District to the Circuit Court, the party appealing should, within the ten days limited therefor, file a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law, to which the assignee should plead, and the cause proceed to trial as in actions at law, and prosecuted in the usual manner in this court, which, by Sections 24 of the act and 25 of the General Orders in bankruptcy, such claimants are required to do. Non-compliance with the provisions of Sections 8 and 24, and Rule 26, are grounds for dismissing an appeal to the Circuit Court. *Place & Sparkman*, 641.

APPORTIONMENT.

When the bankrupt under a general contract has rendered partial service, but has not completed the contract prior to the filing of the petition, but subsequently fulfills the same, unless the contract for payment was contingent upon full performance of the services, the compensation will be apportioned between the assignee and the bankrupt, in proportion to the value of the services rendered before and after the bankruptcy. *In re Jones*, 347.

ARRANGEMENT.

Although the winding up and settlement of the estate are to be deemed proceedings in bankruptcy under the 43d Section of the Bankrupt Act, which contemplates the superseding of proceedings under the act, and in giving contingencies the "resumption" of such proceedings, yet it is evident that the true meaning is the substitution of the modes prescribed in this section for the ordinary modes. Such proceedings are none the less "proceedings in bankruptcy" under the act, because they are special in their nature. Either *mode* can be adopted, the ordinary one or this special one. The trustees, under direction of the committee, can wind up the estate just as the bankrupt could have done, *or* they may be restricted to the more limited powers and duties of ordinary assignees. *In re Darby*, 309.

ARREST.

A creditor recovered judgment and execution against a bankrupt in the State court. The bankrupt was subsequently arrested on the execution, and gave a recognizance before a magistrate to appear for examination under the laws of the State, for the relief of poor debtors. He appeared, and the examination was continued from time to time. The bankrupt, pending the examination, filed his petition in bankruptcy; an assignee was afterwards chosen. The creditor afterwards filed with the magistrate charges of fraud against the bankrupt, under the statute of the State.

Held, that such charges of fraud filed with the magistrate by the judgment creditor, are not a new suit which should be stayed under the 21st

Section of the Bankrupt Act, and that the bankrupt was not entitled to a discharge from arrest. *Minon* v. *Van Nostrand et al.*, 108.

ASSETS.

Assignees of a bankrupt may recover a sum belonging to the bankrupt in the appellants' hands at the date of adjudication of bankruptcy. *John Maxwell Mackay*, 64; *The Chartered Bank of India, etc.*, v. *Evans et al.*, 185.

ASSIGNMENT.

1. Where an assignment was made by Bankrupt Court, such transfer, being by operation of law, did not avoid the policy, and that the assignee is entitled to recover the insurance money. *Starkweather, Assignee of Wells*, v. *The Cleveland Insurance Company*, 341.
2. An assignment only transfers the property which the bankrupt then had, excepting, of course, fraudulent conveyances made by him previously to the commencement of bankruptcy proceedings. *Mayo* v. *Manufacturers' National Bank of Philadelphia*, 660.
3. A decree annulling a voluntary assignment by a debtor of all his estate in trust for the equal benefit of all his creditors, made within six months before the commencement of proceedings under which he was adjudged a bankrupt, should contain a direction for a conveyance by the voluntary assignee, surrendering the estate to the assignee in bankruptcy.

The accounting by the voluntary assignee should be, under the decree, to the assignee in bankruptcy. There should be no subsequent account in a proceeding under State legislation in a court of the State, unless some extraordinary reason requires a distribution under the laws of the State for the benefit of the general body of the creditors. *Burkholder et al.* v. *Stump*, 597.

4. The assignee takes the property of the bankrupt "in the same plight in which it was held by the bankrupt when his petition was filed." *Charles H. Wynne*, 23.

ASSIGNEE.

1. A majority in number and value of the creditors petitioned the court to appoint a meeting, that a vote might be taken upon the removal of the assignees. At the meeting the requisite majority voted for their removal, and reported their action for the consent of the court, which decided that it could exercise judicial discretion in the matter, notwithstanding the action of the creditors; and further, that it is not the intention of the United States Bankrupt Act of 1867, that the majority should have absolute control over the rights and interests of the minority, and that under the peculiar circumstances of the case the assignees ought not to be removed. *In re Dewey*, 412.
2. An assignee who fails to deposit funds in his hands belonging to the estate of which he is the assignee, as required by the rules of court; who suffers the foreclosure of a mortgage, neglecting an opportunity to purchase it at less than its face; is guilty of similar neglect in regard to a judgment; pays money out of the estate to satisfy the judgment after a levy by the sheriff; pays seven per cent. interest while he is loaning

moneys belonging to the estate at six per cent., and also fails to comply with the directions of the Register, as required by the Bankrupt Act and rules of court, will be required to show cause why he should not be removed from his trust.

Register directed to employ counsel to represent the estate of the bankrupt at the hearing of the order to show cause. *In re Price*, 406.

8. The assignee in bankruptcy of a manufacturing corporation having sold at auction in one parcel, for a greatly inadequate price, two separate mills, each completely furnished with machinery; a hotel; a store; twenty dwelling houses, each susceptible of separate occupation; and sundry vacant lots, not necessary to the use of the mills, subject to a mortgage on the whole, and the property having been purchased at such sale by a combination of certain creditors of the corporation, while other creditors were ignorant of the time and place, and even of the fact of the contemplated sale; and such ignorance was known and acted upon by the agent for the purchasing combination, the sale was set aside on the application of such other creditors. *The Troy Woolen Company*, 629.

4. Where it is deemed advisable to remove an assignee on account of peculiar relations existing between him and the bankrupt, but there is no evidence of any breach of his trust, he ought to be fully protected, and his cost paid by estate. *Mallory*, 153.

5. The assignee represents the creditors' rights as well as those of the bankrupt, and any incumbrance which would be void as against creditors, would be void as against him. *In re Charles H. Wynne—Involuntary*, 23.

6. Where an appellant in this court becomes bankrupt after his appeal taken, his assignee in bankruptcy, upon the production of the deed of assignment of the Register in Bankruptcy, duly certified by the clerk of the proper court, may, on motion, be substituted as appellant in the case. *Herndon* v. *Howard*, 212; *McKinsey & Brown* v. *Harding*, 39.

ATTACHMENT.

1. The assignment of a bankrupt's estate, under Section 14, United States Bankrupt Act of 1867, does not dissolve an attachment of his estate made more than four months prior to the commencement of his proceedings in bankruptcy. *Joseph J. Bowman* v. *Leander D. Harding*, 20.

2. The clause in Section 14 of the United States Bankrupt Act of 1867, providing that the conveyance therein mentioned "shall dissolve any attachment made within four months next preceding the commencement" of the debtor's proceedings in bankruptcy, is equivalent to an express provision for the preservation of an attachment made more than four months. *Leighton* v. *Kelsey et al.*, 471.

BANKRUPT ACT.

A Bankrupt Law is intended to uphold amongst bankers, merchants, etc., prompt payment of commercial obligations, but it should not be perverted to the purpose of wrong and injustice by compelling honest debtors, under apprehension, to yield to unjust exactions from alleged creditors. *Leonard*, 562.

BANKRUPT DISCHARGE.

Where bankrupts (involuntary) complied with all the requirements of the Bankrupt Law, filed a petition for their discharge, there being funds in the hands of the assignee, and the final dividend not having been declared, the following question arose: "Whether the costs incurred upon the petitions of bankrupts for their discharge, the hearing on said petition, publication of notice of hearing, etc., shall be paid out of the funds in the assignee's hands belonging to the estate of said bankrupt, or by the bankrupts themselves?" *Held*, the cost must be paid from the funds of the estate. *M. Olds et al*, 146.

BANKRUPT'S EXAMINATION.

A bankrupt having objected to an examination before a Register in Bankruptcy upon the following grounds:

That the Register has no authority to grant an order for the examination of a bankrupt, either by statute or rule.

That the order, if granted, as it recites on application, should have been on a verified application in writing.

That the order is on its face defective, in that it does not purport to be "on the application of a creditor who has proved his claim."

Held, that the examination is correct. Third objection is frivolous. *In re Vetterlein*, 599.

BOARD OF TRUSTEES.

Although the management of a corporation may be committed to a Board of Trustees, by the laws of a State, that of itself does not authorize them to file a bankruptcy petition, under an act of Congress, whereby others have been clothed with the requisite power. "*Lady Bryan Mining Co*," 394.

BOOKS OF ACCOUNT.

1. A bankrupt, in June, 1867, sold out the whole interest in his store. His petition in bankruptcy was filed in February, 1868. Between June and February he was out of business, except that he bought and sold apples, partly on his account and partly on a joint enterprise with another. He kept no books of account.

Held, that the omission to keep such books must prevent the granting of his discharge. *In re Tyler*, 108.

2. Where bankrupts are charged with not keeping proper books of account, and the receipts and disbursements entered in cash-book were unintelligible,

Held, discharges cannot be granted to bankrupts. *In re John Murdock Mackay and John Neilson*, 66.

3. Where it appears from the evidence that a bankrupt has failed to keep proper books of account, the case is one in which, under Section 29, a discharge cannot be granted. *In re Bound*, 510.

4. See *John Maxwell Mackay*, 64.

BURDEN OF PROOF.

1. The *onus* is on the assignee to show, affirmatively, that money deposited

in a bank by the bankrupt after the petition was filed was his (the bankrupt's) property at the time the assignment by relation took effect. *Mays et al., Assignees of Born*, v. *The Manufacturers' National Bank of Philadelphia*, 660.

2. *Cummings* v. *Stoddard*, 254.

CARRYING ON BUSINESS

Under Section 43, the court may authorize the trustees to carry on the business of the bankrupt as if there had been no failure; and may allow formal proof of debt to be dispensed with where the correctness is admitted. *In re Darby*, 211.

CERTIFYING QUESTIONS.

Where the questions certified to a United States District Judge in bankruptcy only contain abstract questions, and do not arise in the course of the bankruptcy proceedings, or upon the result of such proceedings, and are certified in behalf of a person who is not a party in the Bankrupt Court, such questions not being certified as authorized by the act, they will be returned undecided, for the reason that a decision on them would be of no force or effect. *In re Haskell*, 558.

CHATTEL MORTGAGES.

1. Transfers of personal property, consisting of a stock of goods by an insolvent, only take effect from its delivery.

An unregistered personal mortgage is not valid in the State of Kansas as against creditors.

Where the mortgagor remained in possession of his stock of goods, the property mortgaged, and continued with consent of the mortgagee to make sales therefrom, the mortgage does not constitute a lien. *The Second National Bank of Leavenworth et al.* v. *Hunt, Assignee of Keller & Gladding*, 616.

2. A mortgage of personal property being, under the laws of Wisconsin, ineffectual to pass after acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee who had taken possession.

Though a mortgage be valid as to property then in possession, in a case where a mortgage subsequently given to cover the property afterwards acquired, would have been void under the Bankrupt Law, the authority given in the mortgage does not enable the mortgagee, by taking possession of such property, to hold it as against the assignee. This would be, in effect, a preference, and against the spirit of the act.

A mortgagee in possession being entitled to retain all property upon which his mortgage was valid, the expenses of a sale of such property by order of the District Court should not be paid out of the funds in court *pro rata* with other expenses in bankruptcy.

A chattel mortgage "of all the goods and merchandise" in a store here held not to include fixtures. *In re Eldridge*, 498.

CHOICE OF ASSIGNEE.

1. The election of a near relative of the bankrupt as assignee is not proper. In such case, the appointment by the Register of a regular assignee (according to the rules of the district) will be confirmed. *Weeks*, 370.
2. Relationship in the ninth or less degree on the part of a proposed trustee, to a bankrupt or to a creditor, even the largest in amount, of a bankrupt, or to a proposed member of the committee, or on the part of a proposed member of the committee, to such creditor, or to the bankrupt, cannot be regarded as a disqualification. Other facts may concur with relationship which would make confirmation improper. Where three-fourths in value of the creditors who have proved their debts designate the trustee and the committee, and it does not appear that they are acting in the interest of the bankrupt, their choice will be sustained. The claim of any creditor may be investigated under Section 22, and examination of any person had under Section 26, notwithstanding the appointment of a trustee, and the assignment of the estate to him. *In re Zinn et al.*, 436.

CIRCUIT COURT.

1. In this case the Circuit Court for the Minnesota district had no *bankruptcy* jurisdiction, and could exercise only its ordinary equity powers, and for this reason the injunction asked for was refused. *Markson & Spaulding* v. *Heaney*, 510.
2. Powers of the bankrupt courts and of the Circuit Courts, and the purpose of Congress in establishing bankrupt tribunals considered. *Markson & Spaulding, Assignees*, v. *Heaney*, 510.

COMMERCIAL PAPER.

1. An accommodation indorsement on a note does not make it commercial paper as to the accommodation indorser. *Innes* v. *Carpenter*, 412.
2. The words, commercial paper, in the 39th Section of the Bankrupt Act, include not merely paper given by a merchant in the direct course of his business, but all paper governed by the rules which have their origin in and are founded upon the custom of merchants. *In re Chandler*, 213.
3. The allegation of stoppage and suspension of payment on a certain day, upon commercial paper which was made and dated within the six months next preceding the actual filing of the petition, connected with the allegation that payment of the commercial paper (a due bill) had been demanded at different times, and that the respondent had failed to make such payment, was equivalent to an allegation of a demand for payment on that day. *In re Chappel*, 540.

CONCEALMENT.

1. There is no concealment where a debtor makes a *bona fide* conversion of his property, and shows good faith in respect to the care of the money received therefrom. *Fox* v. *Eckstein*, 373.
2. Where an amended answer set up a discharge in bankruptcy, objection cannot be made on the ground that claimants' names had been omitted from the bankrupt's schedules of creditors without an allegation that the omission was intentional. *Payne et al* v. *Able et al*, 220.

CONFEDERATE MONEY.

Proof of a note payable "*in current money of the State*" in which it is made, is, if not otherwise open to objection, allowable; and even though the State in which the note is made payable should at the maturity of the note be in rebellion, and it be claimed that such a demand should not be proved in bankruptcy as payable in lawful currency of the United States, but in the State treasury notes of the State in which the note was made, the objection cannot be sustained, and the owner of the note will be entitled to have his debt estimated at its face, with interest, in lawful money. *In re Whittaker*, 160.

CONFESSION OF JUDGMENT.

When a debtor confessed a judgment within four months previous to the filing of the petition against him, being at the time insolvent, and the creditor having reason to believe him so, though there was, as a consideration, a pre-existing debt: *Held*, to be in fraud of the Bankrupt Act, being in the category of acts prohibited in Section 35.

The fact that the judgment was taken as a collateral for the security, aggregate of several other judgments, regular and valid, and to facilitate their collection, does not affect their validity. *Vogle* v. *Lathrop*, 439.

CONSPIRACY.

A conspiracy to obtain goods under color of a purchase upon credit, by one of the conspirators, from such persons as he could induce to part with such goods by his falsely pretending to them that he intended to take the goods to his shop to sell in the ordinary course of trade; and, having so obtained the goods, not to take them to the shop, but to secrete them, and cheat and defraud said persons of them, is indictable as a conspiracy to obtain the goods by a false pretense, within the Gen. Sts., C. 161, Section 54, and St. of 1863, C. 248, Section 2. *Commonwealth* v. *Andrew J. Walker et al.*, 672.

CONSTITUTIONALITY.

See *Beckerkord*, 203.

CONTEMPLATING INSOLVENCY.

Where bankrupt was charged, on petition of creditors, with having, in December, 1867, executed a mortgage with intent to prefer other creditors, and, in April, 1868, with having suspended and not resumed payment within fourteen days, the court granted an injunction on said mortgage, and, in July, the debtor was adjudicated bankrupt. The bankrupt leased a spacious mansion, and converted it into an infirmary and bathing establishment, and was supplied with wares and merchandise for fitting up the same by the mortgagees, upon an agreement of credit.

Held, there is not sufficient ground in the evidence for adjudging that debtor was insolvent or contemplated insolvency, or that, in making the mortgage, he even thought of the Bankruptcy Act, much less intended to violate any of its provisions. The mortgagees wisely asked for security, and the debtor had a right to give it. They are not shown to have violated any law, nor, so far as appears in the proofs, any private pledge or

stipulation, or any wholesome custom of trade. Judgment in their favor with costs of suit. *Potter, Denison & Co.* v. *James H. Coggeshall, Trustee*, 73.

CONTEMPT.

On a petition by an assignee in bankruptcy to have a mortgagee adjudged guilty of contempt for violating an order of a United States District Court, enjoining him from foreclosing a mortgage or from prosecuting an action thereon, or from taking possession of mortgaged property when the mortgagee knew of the making of such order, but under advice of counsel evaded service thereon, the mortgagee will be adjudged guilty of contempt, and the amount of fine will be held open until the actual loss and cost to the assignee is ascertained. *Feeny*, 233.

CORPORATIONS.

1. Where an order was made by the District Court, vacating the adjudication of a corporation as bankrupt, because the proceedings in which the petition was filed were informal and unauthorized. On an application made to the Circuit Court to reverse such order,

Held, that the order vacating the adjudication was correct. Where the petition in bankruptcy was filed without proper authority, the Register acquired no jurisdiction. Under the provisions of the 37th Section the filing of the petition must be "duly authorized by a vote of the majority of the corporators, at any legal meeting called for the purpose." No other petition can be recognized under the act.

A corporator is one of the constituents or stockholders.

2. Where the Board of Trustees of a company authorized their secretary to file petition for the purpose of having the corporation adjudicated bankrupt,

Held, that such filing was illegal, the trustees having no power to authorize their secretary to do so. When a corporation seeks to avail itself of the provisions of the Bankrupt Act, it must do so in the manner prescribed by the act. Adjudication vacated. *In re "The Lady Bryan Mining Co.,"* 144;

3. See *Sarah O. Allen* v. *The Soldiers' Business Messenger and Dispatch Co.*, 537. *"Lady Bryan Mining Co.,"* 394.

CORPORATOR.

The action of a board is not the action of the corporation. The corporation must act at a meeting "called for the purpose." *"Lady Bryan Mining Co.,"* 394.

COST.

1. It was reasonable that the assignee should file the bill in this case, therefore it will be dismissed, but without costs to either party. *Geo. K. Collins, Assignee of Frank E. Gray*, v. *Justus Gray and Frank E. Gray*, 631.
2. The assignee, when he has funds, should pay the costs. *In re M. Olds et al., Involuntary*, 146.
3. See *Keefer*, 389; *Mallory*, 153.

CRIMINAL PROCEEDINGS.

The liability of a bankrupt to criminal prosecution in the courts of the United States, under Section 44 of the Bankrupt Act of 1867, for obtaining goods on credit, with intent to defraud, and under false color and pretense of dealing in the ordinary course of trade, within three months before the beginning of the proceedings in bankruptcy, does not exclude the courts of the Commonwealth from jurisdiction of him and others for conspiring to obtain the goods by the false pretense, under Gen. Sts., C. 161, Section 54, and St. of 1863, C. 248, Section 2.

It is no defense to an indictment that the facts in proof show that the defendant committed an offense of a higher degree than that charged. *Commonwealth* v. *Andrew J. Walker et al.*, 672.

DAMAGES.

Where the claim for damages by reason of the detention and loss of a seasonable market for the goods is not sustained by the evidence, same will not be allowed. *In re Feeny*, 233.

DEBTS.

An open running account for merchandise sold, consisting of various items of charges and credits at different times, on which was credited the amount at which property was purchased by way of fraudulent preference, leaving a balance which was proved up before the Register against the bankrupt's estate, was held, *prima facie*, to be but a single debt or claim, and, by reason of such preference, disentitled to any dividend on any part thereof. *In re Richter's estate*, 221.

DISCHARGE.

1. Where an application for a discharge had been made prior to July 14th, 1870, and a reference ordered to a Register in bankruptcy to take necessary proofs and ascertain if the assets were not equal to fifty per cent. of the claims proved against the estate of the bankrupt, upon which he was liable as principal debtor, the Register not having made his report thereon until after the amendment to the Bankrupt Act, approved July 14th, 1870, the bankrupt filed a supplemental petition referring to the amendment of July 14th, 1870, and the court modified its original order of reference, and directed the Register, in addition to the requirements of the first order, to determine and report whether the assets were equivalent to *fifty per cent.* of the debts and liabilities contracted after January 1st, 1869. *Rockwell & Woodruff*, 243.

2. The liability of a drawee, upon a bill of exchange accepted and dishonored by him, to an indorser who then pays it, is barred by a discharge of the drawee in bankruptcy proceedings begun after his dishonor of the bill, though before the payment by the indorser. *Thomas J. Hunt et al.* v. *David H. Taylor et al.*, 683.

3. A security on appeal in this State (Georgia), is no longer liable when

the principal is discharged in bankruptcy; this terminates the case in the State court, and prevents judgment. The security on the appeal does not contract to pay the debt, but the judgment that may be entered in the suit then pending. *Odell* v. *Wootten*, 183.

4. Where discharge was refused bankrupt for failing to keep proper books of account. *In re John Maxwell Mackay*, 67.

5. A discharge duly granted under the United States Bankrupt Act of 1867, when pleaded in bar to the further maintenance of action for prior indebtedness cannot be impeached in this court for any cause which would have prevented the granting of it, under Section 29, or been sufficient ground for annulling it under Section 24.

The authority to set aside and annul a discharge in bankruptcy, conferred upon the Federal court by Section 34, is incompatible with the exercise of the same power by a State court; and the former is paramount. *Corey et al.* v. *Ripley*, 503.

See *Tyler*, 103.

6. Where a bankrupt died five months after filing petition, and his attorney asks for discharge on account of said death,

Held, that as the bankrupt had not taken the necessary oath in the 29th Section prior to his decease, and the same being necessary to the granting of a discharge, that it could not be given. *In re Gunike, a deceased bankrupt*, 92.

7. See *Keefer*, 389; *Cassard et al.* v. *Kroner*, 569; *Tyler*, 103; *Loder*, 190.

DISCRETION.

It is a matter of discretion with the court to sell subject to, or free of, the liens or incumbrances. *In re Kahley et al.*, 378.

DISTRIBUTION.

1. Where commercial paper is indorsed by a firm in its firm name, and also by the individual name of one or more members of the firm, and the makers of the note become embarrassed and bankruptcy ensues to the indorsers of the note, and the holders accept with permission of court forty per cent. from the makers, they are only entitled to dividends against the indorsers, individually, and as a firm, to an amount equal to their claim after deducting the forty per cent. received from the makers. *Howard Cole & Co.*, 571.

2. The Constitution gives Congress full power over "the subject of bankruptcies" in the United States; and in the enactment of laws on this subject Congress is not limited to the scope or details of the Bankrupt Act in force in England at the time of the formation and adoption of the Constitution; the subject is committed to the wisdom and discretion of the Legislature, with the one qualification that its laws shall be uniform in their operation throughout the United States.

The property of an insolvent debtor represents, in whole or part, the credit given him by his creditors, and in good morals belongs to them; and the Bankrupt Act, which, under certain circumstances, evincing bad faith

upon the part of the insolvent, compels a distribution of such property among the creditors in proportion to their debts, is a wise and just measure. *Silverman*, 522.

DISTRICT COURT.

1. The District Court has no authority to withdraw cases from the State court, and proceed to their trial here. Congress has not provided that such cases shall be transferred to the District Court, much less has it provided that the District Court may proceed to determine the subject-matter of suits pending in the State courts by issue framed here, to be tried by jury or in any other manner. That part of the prayer of the bill which invokes this mode of relief is therefore denied.
2. An injunction must issue to restrain the using in any matter the agreement of February 18th, 1870; and if necessary, an order will be made on the defendant requiring him to execute such papers as will enable the assignee to appear in the cases in the State courts. *Sampson* v. *Burton et al.*, 1.

EQUITY.

The defendant in an equity suit, must account, before a master, for property received by him. Orders of reference to a master will be settled on notice. *Benjamin, Assignee, etc.*, v. *Graham*, 391.

EXAMINATION.

1. Where an order for examination of bankrupt was obtained by certain creditors through their counsel, the application for said order being neither in writing nor under oath—the bankrupt had previously applied for his discharge.

Held, the Register, in the exercise of his discretion (Section 26), thought proper to grant the order, without requiring a petition or affidavit duly verified, showing good cause for granting the same. Nothing appears to show that that discretion was improperly exercised, and the order must stand. The time to examine the bankrupt does not expire with the making of his application for discharge. *In re Andrew J. Solis*, 68.

2. See *Belden & Hooker*, 194.

EXAMINATION OF BANKRUPT.

Where bankrupt refused to answer certain questions on the ground that they would criminate or degrade him,

Held, the assignee is entitled to the information; and the questions should be answered by bankrupt. *Richards*, 93.

EXCLUSIVE JURISDICTION.

The bankrupt's certificate of discharge duly pleaded in an action against him in the Supreme Judicial Court of this State, will not, by virtue of R. S. of 1857, C. 81, Section 33, dissolve an attachment made by virtue of the writ in the action, more than four months prior to the defendant's commencement of proceedings in bankruptcy. The attachment thus made

may be enforced by an execution issued upon a special judgment rendered by the court in which the action was entered and prosecuted. The District Court of the United States does not have exclusive jurisdiction in such matters. *Leighton* v. *Kelsey et al.*, 471.

EXECUTION.

1. Where the court cannot approve the bond on appeal as proper in form, and the delay in filing has been more than ten days, the issuing of execution on the decree will not be stayed. *Benjamin, Assignee*, v. *Hart*, 408.
2. The petition of assignees in bankruptcy to have the levy of an execution on personal property of the bankrupts declared void, will be granted where it appears that such levy is not in conformity with the laws of the State in which the same is made. *Beers et al., Assignees*, v. *Place & Co. et al.*, 459.

EXEMPTION.

1. A merchant doing business and residing in Kansas is not entitled to the special exemption allowed mechanics, miners, or other persons for the purpose of carrying on their trade or business. Such exemption made by an assignee in bankruptcy will be disallowed. *In re Schwartz*, 588.
2. Under the statutes of Missouri, in force prior to March 1, 1864, a homestead to the value of one thousand dollars, when owned by the head of a family, was exempt from execution. The exemption applied to an estate for years, when owned by the defendant in execution, and such an estate, when sold by the assignee in bankruptcy, is subject to the exemption, and the assignee will be ordered to pay over the sum of one thousand dollars to the bankrupt where the leasehold estate sells for more than that amount. *Beckerkord*, 203.
3. The provisions of Section 14 of the Bankrupt Act, adopting the exemptions in favor of execution debtors established by the laws of the several States, does not destroy the uniformity of the Bankrupt Act, nor violate any provisions of the Federal Constitution. *In re Beckerkord*, 203.

EXPENSES OF VOID ASSIGNMENT.

Where an assignment by a debtor of all his property to an assignee for the benefit of his creditors under a State law, is avoided by one of his creditors by proceedings under the Bankrupt Law:

It was held that the assignee under the State law is liable to the assignee subsequently appointed under proceedings in bankruptcy for all the property and proceeds thereof in his hands, and has no right to deduct any compensation for his own services in executing the trust as assignee under such State law.

Also, that the proceedings had under the State law, were in fraud of the Bankrupt Act, and the Court in Bankruptcy cannot allow a party the expenses incurred by him in his attempt to defeat the provisions and operations of the Bankrupt Law. *In re Stubbs*, 876.

EXPUNGING PROOF.

Where creditors' claims have been protested against, if duly proved, the

creditors representing those claims will be entitled to an order according to Form No. 45, under Section 26, to examine the bankrupt. *In re Belden & Hooker*, 194.

FEES.

A bankrupt may sell property to raise money for the purpose of procuring means to defray his expenses in contemplated bankruptcy proceedings, provided he does not sell at a sacrifice, and that the sum so raised is reasonable in amount. *Keefer*, 389.

FIDUCIARY DEBTS.

In the provision of the Bankrupt Act of 1867, Chapter 176, Section 33, excepting from the effect of a bankrupt's discharge, debts created by him while acting in any "fiduciary character," does not include the obligation of a creditor, to whom the debtor delivered property with directions to sell it, and apply in satisfaction of the debts so much of the proceeds as might be necessary for the purpose, to pay over to the debtor a balance of the proceeds of the sale remaining after such satisfaction; but, *it seems*, implies a fiduciary relation existing previously to, or independently of the particular transaction from which the excepted debt arises. *Dennis Cronan* v. *Amanda C. Cotting*, 667.

FIXTURES.

In a sale made of the lease, good-will, and fixtures of a grocery store, only such things (or their accessories) as are actually or constructively fastened to the freehold, will pass to the purchaser of fixtures.

A purchaser of the fixtures at such a sale may make claim upon the funds in the hands of the assignee for the sale, by the messenger, of such articles as were properly included under the sale of the fixtures. *In re Hitchings*, 384.

FIFTY PER CENTUM.

1. Where a bankrupt applies for his discharge, his assets not being equal to fifty per cent. of the claims proved against his estate, which were contracted since January 1, 1869,

Held, that bankrupt shall be discharged from all debts provable against his estate which were contracted prior to January 1, 1869.

Discharge does not bar debts contracted since January 1, 1869, which have not been proved. *In re Seay*, 271.

2. Upon the report of the Register to the effect that he had examined the several papers before him (including a consent to the bankrupt's discharge), that the proofs appeared satisfactory; and *there being no opposing interest*, that the assets of the bankrupt were equal to fifty per cent. of claims proved on account of debts and liabilities contracted subsequent to January 1st, 1869, upon which he was liable as principal debtor, that the assent in number and value of creditors who had proved their claims on debts contracted subsequent to January 1st, 1869, had not been filed, and that under the amendments to the Bankrupt Act, approved July 27th, 1868, and July 14th, 1870, the bankrupt was en-

titled to his discharge. Discharge granted by the court. *In re Rockwell & Woodruff*, 243.

FORECLOSURE MORTGAGES.

The District Court in bankruptcy has power to take the administration of the entire estate and ascertain and liquidate liens thereon, and to restrain the holder of a mortgage or other lien, from proceeding in any suit to enforce such lien.

But when no advantage can result to the estate of the bankrupt, and it appears, without contradiction, that the equity of redemption of a mortgage is of no value, there is no reason why the court should interfere.

By electing to pursue the mortgaged premises, the mortgagees deprived themselves of any right to prove their debt in bankruptcy for the deficiency. *In re The Iron Mountain Company of Lake Champlain*, 646.

FOUR AND SIX MONTHS.

The first subdivision of Section 35 of the Bankrupt Act, with its limitation of four months, applies only to cases of payments or conveyances made to a creditor in consideration of pre-existing debts by way of preference, while the second subdivision applies to other transfers and conveyances, made contrary to the provisions and policy of the Bankrupt Act, or in fraud of the act. The provisions of Section 39 avoiding certain acts are subject to the limitations of four and six months contained in Section 35. *Bean, Assignee of Kintzing*, v. *Brookmire & Rankin*, 196.

FRAUD.

In an action by an assignee in bankruptcy of a fraudulent debtor, where the fraud was *continuous*, and the debtor remained down to the time suit was brought, the real owner of the property sought to be recovered, and in possession of it: *Held*, that the statute did not bar the suit, even though the initial fraudulent transaction took place more than five years before suit was commenced. *Martin, Assignee, etc.*, v. *Smith et al.*, 274.

FRAUDULENT CONVEYANCE.

1. When a sale or conveyance by the bankrupt before bankruptcy is void as to creditors, under the local statute of the State where he resides and the sale or conveyance is made, the assignee of the bankrupt, who represents in this respect the rights of the creditors, may impeach the same and bring suit for or in respect to property sold or conveyed.

The statute of the State of Missouri as to fraudulent conveyances, construed and applied by Dillon, Circuit Judge. *Allen, Assignee, etc.*, v. *Eliza A. Massey et al.*, 248.

2. A voluntary conveyance, settling property upon the wife and family of the grantor, will be considered fraudulent as to subsequent creditors, if the grantor be indebted at the time to such an extent that the settlement will embarrass him in the payment of his debts, although the debts due may be subsequently paid in the course of business. *Antrims' Assignee*, v. *Kelly et al.*, 587.

8. Where a transfer of property had been made by bankrupt nine months prior to adjudication, and certain creditors preferred charges of fraud, etc.,

Held, the conveyance is not one which the Bankrupt Act denounces as fraud.—There was no false swearing in not inserting such property in the schedules of assets, it being vested in the receiver appointed by the State court, and not in the bankrupt. The other specifications are not sustained. Discharge will be granted when the Register shall have certified conformity. *John Maxwell Mackay*, 64.

FRAUDULENT PREFERENCES.

1. Where an insolvent debtor executed a bill of sale to a creditor who had obtained the levy of an attachment after notice of the debtor's insolvency, the same was a violation of the Bankrupt Act.

Its inevitable effect was to give a preference. Although insolvency exists, yet, if the debtor honestly believes he shall be able to go on in his business, and with such a belief pays a just debt without a design to give a preference, such payment is not fraudulent, although bankruptcy should subsequently ensue.

2. If the debtor is cognizant of his own insolvent condition, and expects to stop payment, and makes a payment, or gives security to a creditor for a just debt, with a view to give a preference, such payment, or giving of security, is fraudulent as against creditors, and property thus transferred may be recovered by the assignee in bankruptcy, and the debtor's discharge will be denied. *In re Gregg*, 456.

3. *Held*, erroneous to instruct the jury "that under the 35th Section of the Bankrupt Act, if a sale of property by the bankrupt was not in the ordinary and usual course of business, it was fraudulent." The instruction should have been, not that such a sale was absolutely fraudulent, but that the fact referred to was *prima facie* evidence that it was fraudulent. *Babbitt* v. *Walbrun & Co.*, 121.

4. A payment made by a debtor who is in insolvent circumstances, more than four months before the filing of the petition in bankruptcy by or against him, although made to the creditor by way of preference, will be sustained as against the assignee, under the provisions of the first clause of Section 35 of the Bankrupt Act. The limitation of four and six months, in Section 35, are limitations upon payments and conveyances which are otherwise valid under the common or statute laws of the States; but where the payment or conveyance or other transaction, is fraudulent, by any other recognized rule of law, the assignee must sue within two years. In a suit by the assignee to recover of a creditor money paid by the bankrupt by way of preference, the declaration must allege that the payment was made within four months before the filing of the petition in bankruptcy or it will be bad on demurrer. *Bean* v. *Brookmire & Rankin*, 196.

5. On the 19th of April, 1867, Gover, Hardesty & Co., of Baltimore, failed in business, and closed their banking-house, owing the appellant Street, as trustee, a large sum—balance on deposit account. The partners of

the banking-house, it is admitted, regarded this deposit indebtedness as entitled to special preference in payment of debts.

The bank had to their credit, at the time of their failure, two thousand nine hundred dollars in New York. This sum was on the 22d of April attached by the appellant, in a proceeding in the courts of that city, based on a confession of judgment by Gover, one of the partners of the Baltimore Bank, then in New York, and judgment was obtained on the attachment in favor of Street.

On the 20th of April, Hardesty, the other partner, in Baltimore, drew on the New York funds in favor of George H. Williams, attorney for Cohen. A controversy thus sprung up in the New York courts between these opposing creditors, in which the appellant Street prevailed and obtained judgment.

Within four months afterwards, Gover & Hardesty were adjudged bankrupts.

In a suit brought by the assignee in bankruptcy, against Street, to recover back this money, *held*, that the plaintiff was entitled to recover; and judgment of the District Court to that effect is, on appeal, now affirmed. *Darby*, 207.

6. See *Terry & Cleaver*, 126.

7. See *G. Phelps* v. *S. P. Sterns*; *G. Phelps* v. *Smith Dudley*, 84.

GAMING ASSETS.

Property acquired in gaming is assets, which, if the bankrupt spends in gaming he loses his discharge. *In re Marshall*, 106.

IGNORANTIA LEGIS.

Ignorance of the law cannot avail creditors who are possessed of facts that show the insolvency of the debtor, and a preference received under such circumstances is fraudulent and void. *Martin* v. *Toof, Phillips & Co.*, 488.

ILLEGAL PREFERENCE.

Creditors who receive an illegal preference are liable to the assignee of the bankrupt; and the intent of the debtor to give, and of the creditor to secure an unauthorized preference, may be shown by circumstances.

Facts establishing an illegal preference stated. *Giddings' Assignee* v. *Dodd, Brown & Co.*, 657.

IMPEACHING DISCHARGE IN STATE COURT.

In an action in a State court on a debt provable in proceedings against the defendant under the United States Bankrupt Act of 1867, C. 176, and of a nature to be barred by a valid discharge in those proceedings, the validity of a discharge granted to him therein cannot be impeached on account of a fraudulent conveyance of his property, but the remedy given by application to the District Court of the United States under Section 34, is exclusive. *Samuel A. Way* v. *Nelson Howe*, 677.

INDICTMENT.

An indictment which avers that the defendants conspired to obtain "dry goods of an alleged value, under color and pretense of a purchase upon the credit of one of the conspirators, of and from such parties as could thereafter be induced by him to part with such goods under the false and fraudulent pretense thereafter to be made by him to them, that he intended to take said goods to his retail shop, specifying its location, for the purpose of selling them there to his customers by retail, in the usual and ordinary course of retail trade," sufficiently avers that the defendant conspired to obtain the goods by means of the false pretense; it is not bad as charging a pretense of a promissory character for the future and not relating to a present fact; it describes the substance of the pretense sufficiently: and also sufficiently describes the goods to be obtained by it within the Gen. Sts., C. 161, Section 54, and St. of 1863, C. 248, Section 2. *Commonwealth* v. *Andrew J. Walker et al.*, 672.

INDORSER.

The liability of an indorsment, after it has become fixed by protest and notice, is only a secondary liability, and one liable on such notes has not become liable as a principal debtor within the meaning of Section 33. *In re Loder*, 190.

INSOLVENCY.

1. The inability to pay debts in the ordinary course of business, as merchants in trade usually pay them, constitutes insolvency within the meaning of the Bankrupt Act.

Where a party cannot pay his debts in the ordinary course of business, and knows that he cannot, he will be held to have had knowledge of his insolvency. *Martin* v. *Toof, Phillips & Co.*, 488.

2. A person is held to be insolvent when he is unable to discharge his debts in the usual course of business of persons engaged in the same trade or occupation; hence, where creditors have accounts overdue seven or eight months, and finally have to resort to legal measures for the collection of them, they must be considered as having reasonable cause to believe their debtor insolvent, and money received under these circumstances must be paid to the debtor's assignee in bankruptcy, together with interest and costs of the proceedings instituted by said assignee for the recovery of the money. *Stranahan, Assignee of Bannister*, v. *Gregory & Co.*, 427.

INSURANCE.

1. W., on petition of his creditors, was adjudged a bankrupt, being, at the time of the adjudication, the owner of a dwelling-house covered by a policy of insurance containing the following clauses: "If the title of the property is transferred or changed," or, "if the policy is assigned, this policy shall be void." The building was destroyed by fire after the transfer by the Register to the assignee. The transfer being by operation of law, did not void the policy. *Starkweather* v. *Cleveland Ins. Co.*, 341.

2. An adjudication of bankruptcy terminates the interest of the bankrupt in any policy of insurance, and the policy is thenceforth void and of no effect; but an insurance company may consent to continue their liability by the usual transfer of the policy to the Register in charge of the bankruptcy proceedings, until an assignee shall have been appointed, and may also transfer said policy to the assignee when appointed. It is optional with the company to continue the risk by such transfers, or to cancel the same.

INTENT.

1. Where there is no fraudulent intention, a dealer may, although insolvent, continue to sell his stock at retail, and endeavor to effect, if possible, a compromise with his creditors. *Munger & Chapman*, 295.
2. See *Silverman*, 522.
3. See *Gregg*, 456.

INTEREST.

Held, that interest should not be allowed for the period during which intercourse between the parties, and between the parts of the country in which they respectively lived, was suspended by our late civil war.

That the proclamation declaring the blockade of the ports of the insurgent States, must be regarded as the first formal recognition of the existence of civil war by the National Government.

That the period of its termination has not been so definitely ascertained; that it was declared by the President and Congress to have ended August 2d, 1874. *Bigler* v. *Walker*, 291.

JOINT ASSETS EXEMPTION.

Joint assets are liable to the provisions of the Bankrupt Act, allowing exceptions. Where there are not sufficient individual assets, assignees cannot refuse to set aside exempt property out of joint property. *In re Rupp*, 95.

JUDGMENT.

1. An execution in the hands of the sheriff being, by the laws of the State of Illinois, a lien upon all the personal property of the defendant, within the county, for the space of ninety days, if a petition in bankruptcy is filed during that time, the lien is transferred to the property in the hands of the assignee, and the execution must be paid in full out of the proceeds. *Weeks*, 364.
2. The taking of property on attachment or execution is receiving a preference; the mere obtaining of judgment, however, is not. *Stevens*, 367.
3. A judgment taken contrary to the Bankrupt Act is not void, unless a petition in bankruptcy is filed by or against the debtor within six months from the entry of the judgment. *Fuller*, 115.
4. A recovered a judgment in a certain suit prior to his being adjudged a bankrupt. This judgment was amended, after the adjudication and conveyance of A's property to the assignee, by order of the court in which the

action was brought, so as to increase, slightly, the amount of the original judgment.

A's assignee brought suit to recover on this judgment, but his right to maintain the action was denied on the ground that the judgment being entered subsequent to the assignment, was the property of the bankrupt.

Held, that the cause of action and original judgment were clearly antecedent to the application in bankruptcy, and the assignment to the assignee, and as such passed by operation of law to him, subject to all the rights of the bankrupt to have it altered and corrected.

That the right of the assignee to maintain this action does not depend on the instrument of assignment, as the Bankrupt Act of 1867 provides that all *choses in action*, all debts due, etc., together with the right to sue, shall, in virtue of the adjudication, and the appointment of the assignee, be at once vested in such assignee. *Frank Zantzinger* v. *F. I. Ribble, Assignee in Bankruptcy of John C. Deyerle*, 724.

5. See *McKinsey & Brown* v. *Harding*, 89.

JURISDICTION.

Consent cannot give jurisdiction. It makes no difference whether the proceedings are voluntary or involuntary. As all creditors are parties to and are bound by proceedings in bankruptcy that are regular, an adjudication which is not made and carried on within the proper jurisdiction should be set aside and vacated. *In re Fogerty & Gerrity*, 451.

JURY.

When facts appear on the face of the mortgage, it should be held void by the court; but when it appears by evidence *aliunde*, the court should instruct the jury that such understanding would avoid the mortgage. *Kahley et al.*, 878.

LIEN.

1. A debtor's property was seized by the sheriff by virtue of an attachment issued out of a State court. After the levy of the attachment, two suits were commenced in a State court, judgment obtained, executions issued and delivered to the sheriff. After such levy the debtor filed his petition, and was duly adjudged a bankrupt.

The judgment creditors moved for an order directing the payment of the judgments in full, on the ground that, by the Bankrupt Act, the attachment was discharged, and there having been a *bona fide* levy under the executions before the filing of the petition, the lien of the executions is saved by the act.

Held, that the provisions of the act do not indicate any intention to improve the condition of any creditor, or create new rights.

That, in the present case all the right which the judgment creditor acquired, was by a levy in property already subject to an attachment to its full value. Such a levy gave the judgment creditor no security, and does not

entitle him to apply to this court for payment of his judgment in full. *In re Klancke*, 648.

2. A direction by the execution creditor to the sheriff "to hold the execution, but not to levy for a few days, or until further orders," does not impair the lien. *In re Weeks*, 864.

3. *Held*, motion denied without costs to either party, but all proceedings on any judgment that may be obtained against defendant, to be stayed until the further order of the court. *Hoyt et al.* v. *Freel et al*, 131.

4. When the officer's return shows that an attachment was made more than four months prior to the defendant's commencement of proceedings in bankruptcy, the plaintiff is entitled to a judgment, to be satisfied out of the *specific* property returned upon the writ. *Joseph J. Bowman* v. *Leander D. Harding*, 20.

5. Where a creditor claims a lien by virtue of a judgment against the bankrupt, recovered on 5th November, 1866, but which was not recorded in the clerk's office until 16th October, 1867; and another creditor holds a mortgage executed by bankrupt, and recorded 7th April, 1867, the mortgage lien has priority over the judgment. *In re W. Y. Lacy*, 62.

LIMITATION.

1. Unless Congress has otherwise provided, State Statutes of Limitation are applied to controversies in the courts of the United States.

The fraud which in equity will prevent the running of the Statute of Limitations, is that which is secret or concealed, as distinguished from that which is open, visible, or known, and a secret or concealed fraud is in equity a fraudulent concealment of the cause of action.

Even in cases of fraud, the statute will in equity begin to run as against the plaintiff when he has knowledge or information of facts which reasonably create the belief that the transfer is fraudulent and can be proved to be so; and if, under all the circumstances, the plaintiff has been guilty of negligence in discovering or attacking the fraud, the statute will begin to operate against him from the period his laches commenced.

What, in the view of a Court of Equity, will be regarded as a *discovery* of the fraud considered. *Martin, Assignee*, v. *Smith*, 274.

2. The liability of the drawer, upon a bill of exchange payable to his own order, to a subsequent indorser who pays it after it has been dishonored by the acceptor, does not first accrue at the time of such payment, but the Statute of Limitations begins to run against it from the time of the dishonor of the bill. *Thomas J. Hunt et al.* v. *David H. Taylor et al.*, 683.

3. The statute of Missouri, which provides that "actions for relief on the ground of fraud must be brought within five years after the cause of action accrued, but the cause of action shall be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud," construed and considered as in substance enacting the equity rule on the same subject, and fixing the period of limitation. *Martin* v. *Smith et al.*, 274.

4. When a bill in equity was brought to recover from the defendant money alleged to be due to the plaintiff, on an agreement made by the defendant

with the bankrupts to pay them, as salaries for their services as clerks, certain portions of the net profits realized from the business carried on by defendant, and for an accounting, the court decided that a plea as to the Statute of Limitations was not warranted by the 2d Section of the United States Bankrupt Act of 1867, in the above case.

Plea overruled with costs, and defendant allowed to answer the bill. *Sedgwick, Assignee, etc.*, v. *Casey*, 496.

MANUFACTURER.

A person who prepares for market and sells lumber, which is the growth of his own land, is a manufacturer within the meaning of the Bankrupt Act, as amended by the Act of July, 1870. *Chandler*, 218.

MARSHAL.

Where the warrant to a marshal transcends the power conferred on a United States District Court by Section 40 of the United States Bankrupt Act, property taken possession of by the marshal for a person other than the bankrupt, cannot be held by the assignee in bankruptcy. *Harthill*, 392.

MARSHALLING ASSETS.

See *Snedeker*, 168.

MESSENGER.

A sale by the marshal as messenger, under a special order of the court, prior to the appointment of an assignee, is to be considered as in the nature of a sale made by a provisional assignee. *Hitchings*, 384.

MISDEMEANORS.

1. Offenses under Section 44 are misdemeanors, and the word "feloniously" should not be used. *United States* v. *Prescott et al.*, 112.
2. An indictment, where defendant is charged with disposing of certain of his goods and chattels, within three months of his bankruptcy, other than in the ordinary course of his trade, which he had obtained on credit and which remained unpaid for. Defendant was sentenced to fifteen months imprisonment (on being convicted). *United States* v. *Hugh Clark*, 59.
3. An insolvent obtained goods on credit from various parties with the intent to defraud, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, and on a hearing before a commissioner he was held to bail in the sum of five thousand dollars. *United States* v. *Geary*, 584.

MORTGAGE.

1. A mortgage is void as to the after acquired property, but valid as to the fixtures and such portions of the stock as remains unsold and can be identified. *Kahley et al.*, 378.
2. Where a mortgagee fails to secure an equitable lien by bill and the appointment of a receiver on products or rents of mortgaged premises after a default, even though the premises sell for less than his claims at a sale by the mortgagor's assignee in bankruptcy, he will only be entitled to a *pro rata* share on the deficiency of his claim out of the bankrupt's

assets. Products of the mortgaged premises reduced to possession by the mortgagor's assignee in bankruptcy, prior to sale of the mortgaged premises, are to be treated as assets to be distributed under the Bankrupt Act, and the mortgagee cannot claim that a deficiency after sale on his mortgage shall be paid in preference to the claims of other creditors. *In re Snedaker*, 168.

8. A deed of trust executed December 8th, 1866, by a bankrupt who did not file his petition till June 8th, 1867, was not recorded until March 2d, 1867. That the recording (which was within four months previous to the commencement of bankruptcy proceedings) was not an act of bankruptcy, for the deed was operative from its date, and the act of the creditors in recording it, cannot be construed as the act of the bankrupt. *Charles H. Wynne*, 23.

4. Where a mortgage for four thousand dollars was given, while only one thousand dollars was advanced upon it, and was recorded in full—*prima facie* evidence of fraud.

Held, that out of the proceeds of sale of the property seized, the marshal pay over to the petitioning creditors, or their attorneys, the amount of their reasonable costs, expenses, etc., incurred in the proceedings in this matter, and that the balance be paid over to the mortgagee. *In re Edward Dumont*, 17.

MORTGAGEE.

Where a stock of goods, which had been mortgaged, were taken possession of by the assignee, and were sold by order of court, and the money held subject to its order, the mortgagee claiming it by petition, and the assignee opposing on the ground that the mortgage was voidable under 2d clause of 33d Section of the Bankrupt Act, the mortgagor being a trader, and the loan being made out of the ordinary course of business within four months of the mortgagee's bankruptcy: *Held*, that the mortgagee's petition must be dismissed, for the reason that it was out of the ordinary course of business; the mortgagor being a retail dealer, a mortgage of the whole of his stock was a confession of insolvency. If made directly to the creditor, it would have been an act of bankruptcy; and here both parties seem to have considered it injurious to the mortgagor's credit, and agreed that it should not be recorded until some necessity should arise therefor.

If the mortgagee should have applied to court to direct assignee to bring an action against the creditor who received the proceeds of the mortgage, an order would probably have been made to that effect. *In re Butler*, 302.

MORTGAGOR.

That in Wisconsin a clause in the mortgage giving the mortgagors the right to sell the stock and use the money as they might choose, would be to render the mortgage void as to the whole stock. *Kahley et al.*, 378.

MUTUAL DEBTS AND CREDITS.

1. A claim for loss under an insurance policy may be set off by the insured against his indebtedness to the company.

Such claims constitute mutual debts or credits within the meaning of the 20th Section of the Bankrupt Act.

The rights of the parties are to be determined by the state of facts at the time of the loss.

Though such set-off gives the complainant a preference, it results from the business relations of the parties as they stood at the time of the loss.

If his indebtedness is not due, and the company is bankrupt, a bill in equity will lie to establish the set-off. *Drake* v. *Rollo, Assignee, etc., of the Merchants' Insurance Company*, 689.

2. It seems, that a debtor to an insurance company might set off a claim purchased before the filing of the petition, in good faith and for value, if without notice of the insolvency of the company. *Hitchcock* v. *Rollo, Assignee, etc.*, 690.

3. A court of equity should construe the 20th Section of the Bankrupt Act in furtherance of the main purpose of the law, and not permit one creditor to inequitably obtain payment in full, to the sacrifice of the claims of the other creditors.

The language of that section does not foreclose a court of equity from disallowing a set-off when it would work injustice. *Hitchcock* v. *Rollo, Assignee, etc., of the Merchants' Insurance Company*, 691.

ORDINARY COURSE OF BUSINESS.

1. That the sale in question was made out of the "ordinary course of business," and as the purchaser had good reason to believe that the bankrupts were insolvent at the time, it is void under the Bankrupt Act. *Kahley et al.*, 378.

2. A sale of property by the bankrupt, out of the usual and ordinary course of business, is presumptively fraudulent, but this presumption may be rebutted by evidence *aliunde*, to be produced by the vendee. *Babbitt* v. *Walbrun & Co.*, 121.

3. Where a transaction that contemplates the securing of a debt is out of the ordinary course of business, the Bankrupt Act declares it to be *prima facie* fraudulent, and the *onus* of showing that it is not so, is cast upon the defendant. *Martin, Assignee, etc.*, v. *Toof, Phillips & Co.*, 488.

PARTIES.

See *Herndon* v. *Howard*, 42.

PARTNERSHIP ESTATES.

In bankruptcy the joint and separate estates are considered as distinct estates. A joint creditor having security on the separate estate may prove against the joint estate without relinquishing his security—may prove his whole claim against both estates and receive a dividend for each, but so as not to receive more than the full amount of his debt from both sources. *In re Howard Cole & Co.*, 571.

PARTNERS.

1. *Held*, that the rule that prefers partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it.

That the partners in this case did waive it by giving their notes and mortgage upon the partnership property, to secure them, notwithstanding that the debts for which the notes were given were individual debts. *Kahley et al.*, 378.

2. An adjudication of bankruptcy may be made against one partner only upon a joint debt. The partnership creditor has such an interest in the separate property of any one of the partners, that he may proceed against one alone. *In re Melick*, 97.

PAYMENT AFTER COMMENCEMENT OF PROCEEDINGS.

1. Payment to a bankrupt *bona fide* made, and without actual notice, after the commencement of proceedings, is not valid. *Mays* v. *Manufacturers' National Bank of Philadelphia*, 660.

2. The payments the law makes void are those which reduce the means of the debtor to pay his debts ratably; a change in the form of his own obligation from an account to a note, although indorsed, could not have that effect, and works no wrong to the other creditors. *Edward O'Connor* v. *Williard Parker et al.*, 718.

PAYMENT TO BANKRUPT.

The property of a bankrupt vests in his assignee as of the date of the commencement of proceedings, and no payment by or to him (the bankrupt) subsequent to that date is valid, even though made or received *bona fide* or without notice. The earnings and acquisitions of the bankrupt subsequent to the commencement of proceedings in bankruptcy, belong to him; liable, however, to execution or attachment by his former creditors, if he fails to receive his discharge. *Mays* v. *The Manufacturers' National Bank of Philadelphia*, 446.

PETITION.

1. Where an adjudication has been made on a voluntary petition, and a warrant has issued for the first meeting of creditors, and the matter of said petition is still pending without any discharge or discontinuance, and the bankrupt files a second petition in which the same debts and the same creditors are named, the choice of an assignee will not be made in the second proceeding pending the first, and an order will be made staying the proceedings under the second petition. *In re Wielarski*, 390.

2. The defendant may assent to the incorporation of new causes or acts of bankruptcy into the original petition. If consent is withheld, leave should be refused. *In re Leonard*, 562.

3. When in an involuntary case the petitioners failed to subscribe the affidavit to the petition, *Held*,

The petition was defective, inasmuch as the forms prescribed by the Supreme Court required the affidavit and petition to be subscribed by petitioners. Defect incurable, since petition was not a petition *in propria forma*, such as could be amended. *In re Moore & Brother* v. *Harley*, 242.

4. See "*The Lady Bryan Mining Co.*," 144.

PETITIONING CREDITOR.

1. If the debts are provable under the act, they are such as the act contemplates as sufficient on which to base a bankruptcy petition. *Alex. R. Linn* v. *Smith*, 46.
2. On the 2d day of December, 1870, A filed a petition against the bankrupt. An order to show cause was granted, returnable December 10. Subsequently B, another creditor, filed a petition alleging the bankrupt's indebtedness to him, and after alleging the filing and abandonment of A's petition, prayed that bankrupt might be adjudicated upon A's petition.

Held, B's application must be dismissed, on the ground that it should have been made on the return or adjourned day. *In re Olmsted*, 240.

PETITION FOR REVIEW.

1. A delay to file a petition for revision in the Circuit Court, from May 12th, 1869, to June 13th, of the same year, is not unreasonable in the absence of any rule upon the subject in that court, unless such delay has operated to the prejudice of the opposite party.

The Circuit Court has jurisdiction of a petition to revise the decision and judgment of the District Court, refusing to grant to a debtor a certificate of discharge from his debts under the Bankrupt Act.

Such a petition should set forth in what the error in the decision or judgment of the District Court consists, and the nature of the error, for the information of the Appellate Court, and as notice to the opposite party. *Littlefield* v. *Delaware & Hudson Canal Co.*, 257.

2. The mode of review by petition, bill, etc., under Section 2 of the act, is expressly confined to cases in which no special provision is otherwise made, and does not apply to cases where an appeal may be taken.

Claimants cannot be permitted to treat the petition for a review as such a statement as the statute requires upon an appeal. *In re Place & Sparkman*, 541

PLEADING.

1. In an action for trover brought by the assignee in bankruptcy, he undertook to set out in detail in his declaration the manner in which he claimed to have become the owner of the property, but failed to allege an adjudication in bankruptcy. *Wright, Assignee*, v. *Johnston*, 626.
2. The indictment under Section 44 should set out the filing of the petition, the name of the petitioning creditor, the amount of his debt, the alleged act of bankruptcy, and the adjudication of the Bankrupt Court.

The description of the goods obtained must be as certain as it can reasonably be made. It should be as definite as would be required in a declaration in trover. *United States* v. *Prescott et al.*, 112.

3. Where assignee of bankrupt filed a petition, alleging that bankrupt, within six months of his bankruptcy, etc., conveyed certain real estate to C. M. Rogers, valued at about nine thousand dollars, and two promissory notes, with intent to defeat the provisions of the Bankrupt Act, prays for an injunction to set aside said conveyance, etc. Counsel for C. M. Rogers object that the proper remedy is by bill in equity, and not by petition.

Held, objections overruled, and assignee allowed to proceed upon his petition. *In re James W. Norris*, 35.

4. In this court all pleadings must be special, and therefore a mere general denial of the intent with which an act is alleged to have been done is not a good defense to a charge of having committed an act of bankruptcy, but the respondent must also allege, and prove, with what intent he did the act complained of. *Silverman*, 522.
5. In an indictment under Section 44 of the Bankrupt Act, for fraudulently obtaining goods on credit, the proceeding in the Bankrupt Court must be pleaded and proved with such particularity, as to show affirmatively that an adjudication of bankruptcy was made upon a case in which the court had jurisdiction. *United States* v. *Prescott*, 112.
6. See *Bloss*, 147, and *Leonard*, 562.

PRACTICE.

1. The 35th Section of the Bankrupt Act, which declares a sale, transfer, etc., not made in the usual and ordinary course of business of the debtor, shall be *prima facie* evidence of fraud, throws the burden of proof on the purchaser to sustain the validity of his purchase:

That in such a case the proofs may be taken *ore tenus* at the hearing.

That under the evidence in this case the sale was void. *Wilson, Assignee of Cummings*, v. *Stoddard*, 254.

2. A mere general allowance in the decree of the reasonable charges and expenses of the voluntary assignee, should not be understood as including his expenses of a proposed account in a State court. *Burkholder et al.* v. *Stump*, 597.
3. The facts that creditors had not made formal proof of their debts, and even that the claim of such other creditors was disputed, was held to be of no importance on application to set aside a sale.

Provisions proper in the order for a resale suggested. *The Troy Woollen Co.*, 629.

4. If there is not proof sufficient to make it appear that the acts of bankruptcy charged have been committed, no order on the defendant to show cause should be granted, nor an order of seizure, injunction, or arrest. *Leonard*, 562.
5. A debtor or defendant has the right to know what are the allegations which are made against him, and may insist that he shall not be tried on charges not made against him in the original proceedings upon which he has joined issue, and especially that he shall not be called upon just before trial to meet an entirely distinct cause of action. *Leonard*, 562.
6. See *Andrew J. Solis*, 68, and *Kahley et al.*, 378.

PREFERENCE.

1. Although a debtor, previous to committing an act of bankruptcy, may be sued, and on recovery of judgment an execution, levy, and sale may follow, and although mere insolvency is not sufficient grounds on which to make a decree of involuntary bankruptcy, yet, if the debtor suffers a preference of creditors by means of such judgment or otherwise, that

of itself will be an act of bankruptcy. And such advantage, obtained by creditors having reasonable cause to believe their debtor insolvent, must yield to the right of the assignee, provided other creditors file their petition within six months. *Smith, Assignee, etc.*, v. *Buchanan et al.*, 397.

2. Where a mortgage was made on a whole stock of goods, with the understanding that the mortgagors would sell the stock then on hand, and put in more from time to time as they might be able or wish to, *held*, that the mortgage as against creditors was not valid. *Kahley et al.*, 378.

3. Where a trader makes a compromise with his creditors by making a sale of his stock, giving to the creditors part cash and part notes of the purchaser, the same being done in pursuance to an arrangement made with some of the creditors directly, and others through an agent, there is no fraud on the part of the debtor if an agent of one or more of the creditors exceeds his authority in accepting the compromise and the debtor is ignorant thereof. *In re Munger & Champlin*, 295.

4. A preference to a creditor will not be declared void under the Bankrupt Law, unless made within four months before the filing of the petition. *George K. Collins* v. *Justus Gray et al.*, 631.

5. Where a creditor has reasonable cause to believe his debtor insolvent, he acquires no preference in bankruptcy over other creditors of the debtor, by taking a promissory note with warrant of attorney to confess judgment, and levying an execution issued on said judgment note, on the stock of goods.

The execution being levied a few days over one month before proceedings in bankruptcy were commenced against the debtors, the limitations of the 35th and 39th Sections of the Bankrupt Act do not apply. *In re Terry & Cleaver*, 126.

6. The necessary effect of a conveyance to creditors in satisfaction either in whole or in part of a pre-existing debt, by one who knows that he is insolvent, is a preference in fraud of the Bankrupt Act, and he must be held to have intended this as a necessary result of his action. *Martin* v. *Toof, Phillips & Co.*, 488.

7. When the unlawful intent is the necessary consequence of the act charged, as in the case of a payment of one creditor by an insolvent debtor, a mere denial of such intent is no answer to the petition, and judgment may be given against the respondent as upon a failure to answer. *In re Silverman*, 522.

PROCEEDINGS IN BANKRUPTCY.

A proceeding in bankruptcy, from the filing of the petition to the distribution of the bankrupt's estate and his discharge, is a single statutory proceeding.

When it occurs, pending this proceeding, that the assignee or creditor is driven to file a bill in equity or bring an action at law, the Circuit Court has no supervisory jurisdiction of the proceedings had therein; nor has it when the claim of a supposed creditor has been rejected in whole or in part, nor where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal.

Other questions, however, arising in the District Court in the progress of a case in bankruptcy, whether of legal or equitable cognizance, fall within the supervisory jurisdiction of the court, and may, upon bill, petition, or other proper process of any party aggrieved, be heard and determined in the Circuit Court as a court of equity. *In re York & Hoover*, 479.

PROCEEDINGS IN STATE COURT.

From and after filing of petition in bankruptcy a creditor in a State court acquires no rights, which a decree in bankruptcy would not annul.

The creditors who, having had reason to believe that the debtor was insolvent, neglecting payment of debts, permitting suits, and neglecting to take advantage of the Bankrupt Act for the benefit of his creditors without preference, endeavored to secure a preference, were acting in fraud of the act. *Smith* v. *Buchanan et al.*, 397.

PROMISSORY NOTE

1. A gift is not in itself a sufficient consideration to support a promise of payment, even if expressed in a note, neither is a mere moral consideration sufficient to support a promise to pay. A note given in place of a lost note, if there was no consideration for the making of the original (or lost) note, whether a voluntary gift, is not a sufficient claim on which to base a petition for bankruptcy proceedings. *In re Cornwall*, 400.
2. It is no defense to an action on a promissory note that it was given and accepted in payment for a precedent debt, with knowledge on the part of the creditor receiving the note, that his debtor was insolvent; that such note was given with a view to prefer this creditor; and that the debtor was soon after the giving of the note adjudicated a bankrupt. *Connor* v. *Parker*, 713.

PROOF OF CLAIM.

1. Involuntary proceedings may be instituted against a debtor, although the debt is not yet due, if it is a provable debt. *W. B. Alexander, J. F. Alexander*, 178.
2. See *Ghirardelli*, 164.

PROOF OF DEBT.

1. A Register has power to postpone the proof of a claim where there are doubts as to its validity, in view of the receipt of a preference contrary to the provisions of the United States Bankrupt Act of 1867.

It is not necessary for creditors who have recovered judgments after the adjudication of their debtor, to vacate their judgments before they can prove the claims on which such judgments were recovered, provided the claims were otherwise valid and properly provable. *In re Stevens*, 367.

2. Allegations upon information, and being merely supported by other proof, are not sufficient to sustain an injunction. *Bloss*, 147.
3. Debts proved by creditors were disallowed, on the ground of having taken a mortgage to secure their debts within four months of adjudication. *George G. Phelps* v. *S. P. Sterns*. *Same* v. *Smith Dudley*, 34.
4. Where the debt or claim on account of which the illegal preference is received is single and entire, the creditor is entitled to no dividends thereon, though it may have been proved up or allowed before the judgment was

obtained which established the fraudulent character of the preference. *Richter's Estate*, 221.

5. A creditor is only barred from proving his debt when a recovery has been had under Sections 35 and 39 of said Bankrupt Act. *In re Scott & McCarty*, 414.

6. See *Whittaker*, 160.

PROVABLE DEBTS.

A creditor can file a petition against his debtor even though his claim is not due. *Alex. R. Linn* v. *Smith*, 46.

PURCHASER.

That the purchaser, on the title failing which he supposed he got, would be restored to his rights as mortgagee as they existed when he attempted to purchase, and he would lose nothing more than his title under the purchase. *Kahley et al.*, 378.

RAILROAD CORPORATIONS.

The grantee of the franchises of a corporation to operate a railroad, can acquire no greater rights than the corporation itself has by the terms of its charter. The purchaser must take his title subject to all the conditions of the original grant, and subject to all duties and liabilities to the State, the public, and individuals, none of whose rights can be impaired by the transfer. Hence, there are no such inherent difficulties in the way of the sale and transfer of the property and franchises of a railroad as would require such a construction to the United States Bankrupt Act of 1867, excluding railroad corporations from the operation of that clause of the act, a literal construction of which clearly rendered them liable to be dealt with under its provisions. *Adams* v. *Boston, Hartford and Erie Railroad Company*, 314.

RATIFICATION.

Subsequent satisfaction, by stockholders, does not cure the defect of a want of jurisdiction by the Register at the commencement of the proceedings. *In re "Lady Bryan Mining Company,"* 394.

REASONABLE CAUSE.

When it is sought to affect a second vendee with fraud, such fraud must be shown, and the *mere fact*, without more, that he knew that the sale by the bankrupt to the first vendee embraced all the stock of the seller, will not make the purchase of the second vendee fraudulent in law. *Babbitt, Assignee*, v. *Walbrun & Co.*, 121.

RECEIVER.

See *Smith* v. *Buchanan et al.*, 397.

RECORD.

The recording is only necessary to make an instrument valid against creditors under State laws, and the Bankrupt Act recognizes and respects such validity if it be prior to bankruptcy proceedings. *Charles H. Wynne*, 23.

RELATION BACK OF ASSIGNMENT.

The assignment of the bankrupt's property to the assignee in bankruptcy, no matter when made, by the construction of the 14th Section of the Bankrupt Act of 1867, takes effect, by operation of law, as if it had been made at the commencement of proceedings, or on the day of filing the petition. The assignment is such a notorious judicial act that all the world is bound to take notice of it. *Mays* v. *Manufacturers' National Bank of Phila.*, 660.

REMOVAL OF CAUSES.

If an act is in fraud of the Bankrupt Act, though not in conflict with the practice in the State courts, the Bankrupt Act must prevail as the paramount law. Stay of proceedings is granted in all the cases referred to in the bill until the questions involved can be determined in that court (State). *Sampson Assignee*, v. *Burton et al.*, 1.

RENT.

1. Where, under State laws, the landlord has a lien for rent, the same will be upheld and respected in a Bankruptcy Court, and the assignee must take title subject thereto. The landlord will be entitled to prove his claim in bankruptcy for the unexpired term of a lease beyond one year, even though he has been preferred under a State law, for his rent up to the end of the year. *Charles H. Wynne*, 23.
2. If the assignee in bankruptcy elects to accept a lease held by the bankrupt, he renders himself liable on behalf of the estate, for rent from the date of the petition. *In re Laurie, Blood & Hammond*, 32.

RESIDENCE.

1. Where it appeared, even after an adjudication of involuntary bankruptcy (although with consent of debtors), that the bankrupts had a notorious place of business in another district up to within six weeks prior to the filing of a petition of bankruptcy against them in the district in which the adjudication was made,

Held, that the court could not entertain a voluntary petition presented by the bankrupts for adjudication, owing to such residence and place of business. *Fogerty* v. *Gerrity*, 450.

2. The debtor, being a resident of St. Louis with his family, bought a stock of goods in Montana in July, 1869; went to Montana in August, 1869, leaving his family in St. Louis; remained in Montana, except a few weeks, when on a business trip to St. Louis, until June, 1870; a petition in bankruptcy was filed against him in the Eastern District of Missouri, July 8th, 1870.

Held, that Montana was his place of *residence* within the meaning of the Bankrupt Act, during the six months preceding the filing of the petition; the word "residence" in Section 11 not being synonymous with the word "domicile." *In re Watson*, 613.

RESTRAINING SUITS.

1. Application for leave to commence a suit against the bankrupt will be enter-

tained and leave granted to begin an action for a debt to which the bankrupt's discharge would not be a bar, if it appears that if not commenced forthwith the Statute of Limitations might run against it, or that service might not be obtained upon the bankrupt afterwards, or that testimony might be lost: and the court will then stay the suit to await the determination of the question of the debtor's discharge or the expiration of a reasonable time to make application therefor. But where no such reasons are offered for leave to commence a suit, the court will deny an application therefor. *In re Ghirardelli*, 164.

2. Where the United States District Court, by bill in equity, is prayed to arrest litigation pending in the State court and to hear and determine the controversies involved, and to set aside an agreement that was held to be in fraud of the Bankrupt Act, and an attempted invasion of the rights of the general creditors,

It is the duty of the court to grant some effectual relief against the use of this agreement, and secure to the assignee all the rights which the Bankrupt Act confers upon him. *Sampson* v. *Burton et al.*, 1.

3. A debtor residing in Kansas was adjudged a bankrupt on the petition of creditors, by the United States District Court for Kansas, and assignees appointed. After the bankruptcy proceedings were instituted, a mortgage creditor commenced suit to foreclose in one of the State courts of Indiana, without permission of the Bankrupt Court, making the assignees defendants. The mortgagee was a resident and citizen of Minnesota. The assignee in bankruptcy filed a bill in the Circuit Court of the United States for the District of Minnesota against the mortgagee, charging that the mortgage was fraudulent both in fact and under the Bankrupt Law, and asking a decree to have it declared void, and for an injunction to restrain the defendant from further prosecuting his foreclosure suit in Indiana.

Held, that the District Court in which the bankruptcy proceedings are pending, or the Circuit Court for that district, can, in cases where the suit in the State Court is commenced, *after* the proceedings in bankruptcy are instituted, enjoin the plaintiff therein from further prosecuting the same. *Markson & Spaulding, Assignees*, v. *Heaney*, 510.

RESTRAINING SUITS IN STATE COURTS.

1. The District Court has jurisdiction to ascertain and liquidate all liens upon the bankrupt's property, and in the exercise of this jurisdiction may enjoin a creditor from enforcing a judgment in a State court against the property of the bankrupt: but after the process of the State court has been executed by a sale of property, the District Court will not interfere. *Fuller*, 115.

2. See *Minon* v. *Van Vostrand et al.*, 108.

SALE OF ENCUMBERED PROPERTY.

That under Sections 1 and 20 of the Bankrupt Act the court has the right, through its officers, to take possession of all mortgaged property free of

the lien of the mortgage, without first satisfying that lien, but in such case the lien is transferred to the fund in court. *Kahley et al.*, 378.

SALE OF PROPERTY.

Where it is thought desirable, in order to obtain a better price for property, an injunction will be so far modified that the sale may take place under a judgment, and the referee may unite in the deed. *In re Hanna*, 411.

SCHEDULES.

Held, the discharge in bankruptcy was sufficiently pleaded, and it was admitted to be genuine by replication. The mere omission of the name of a creditor on the schedule of a bankrupt is not a substantive ground for preventing or avoiding the discharge of the bankrupt as to such creditor, unless the omission was willful or fraudulent. *Payne & Brother* v. *Able et al.*, 220.

SECTIONS 39 AND 35.

The concluding sentence of Section 39 is to be read and understood with reference to the previous provisions of the act, and should be construed just as it would if the words "subject to the limitations and provisions of the 35th Section" had been added thereto, or inserted therein; as it is the duty of the court to harmonize the sections, instead of construing the latter as an abrogation of the former. *George K. Collins* v. *Justus Gray et al.*, 681.

SECURED CREDITOR.

1. A creditor who holds a mortgage upon the property of his debtor, can proceed against the debtor, by petitions in bankruptcy, provided the security falls short of a full indemnity by two hundred dollars or more. *In re W. B. Alexander. In re J. F. Alexander*, 178.
2. The District Court will not take jurisdiction in bankruptcy on the petition of an only creditor, whose debt is secured by virtue of a judgment which is the only lien on real estate.

Such creditor seeking to set aside a fraudulent conveyance, must follow his remedy by bill in the State court.

A conveyance, even though fraudulent, is not made "in contemplation of bankruptcy or insolvency," there being no other creditors, and this debt being secured.

There is nothing to bring such a case within the scope or intent of the act. *In re Johann*, 434.

3. The right of a preferred creditor to prove his debt is conferred by the Bankrupt Act, independent of the second clause of Section 23, the operation of that clause being merely to suspend that right until such creditor shall have surrendered all property, etc., as therein provided, and in the construction of this clause it makes no difference whether the petition be voluntary or involuntary. *Scott & McCarty*, 414.

SECURED DEBTS.

That a creditor who has a lien upon the property of his debtors by virtue of a judgment, etc., filing a petition for adjudication of bankruptcy without

reference to such lien, thereby waives and relinquishes the same, and stands before the court as an unsecured creditor. *Bloss*, 147.

SECURITY.

A mortgage or other conveyance made as security for a debt evinced by a note or bond, will be upheld as a security for the same continuing debt, though the evidence of it may be changed by renewal or otherwise, but where the security is changed the same will not be. *Charles H. Wynne*, 23.

SET-OFF.

1. The assignee of B brought suit against D and E to recover the value of certain personal property which had been disposed of by the defendants. Against D, the claim was made on the ground that he had received certain goods which were transferred to him by a warehouse receipt.

As against E, the claim was, that, knowing the insolvency of B, he received under general assignment to himself all the remaining property of B.

The evidence showed that D transferred the property in his possession under the warehouse receipt to E, as the general assignee.

Held, that D was not liable as transferee of the warehouse receipt, but only for money received from E, the assignee, as a preferred creditor.

That as E was not a creditor of the bankrupt, and as he had distributed some of the property to the preferred creditors under the general assignment, before the commencement of proceedings in bankruptcy, he was not chargeable with the value of any property turned over to lawful creditors of the bankrupt, but was liable for the balance only which shall appear to be in his hands after a proper accounting with the assignee in bankruptcy. *Jones* v. *Kinney et al.*, 649.

2. The assignee of a claim against an insolvent insurance company for loss under its policies, assigned after notice of insolvency, cannot set it off against his previous indebtedness to the company.

The debts and credits are not mutual under the 20th Section of the Bankrupt Act.

Such a set-off would be unjust and inequitable.

Though courts of equity follow the law in allowing or refusing set-off, special circumstances may control the equity.

An assignee of a claim seeking to establish a set-off, should show, not merely that he is the nominal owner of the claim, but that he has good equitable grounds for relief. *Hitchcock* v. *Rollo, Assignee, etc.*, 690.

SETTING ASIDE DISCHARGE.

If a creditor, who was fraudulently omitted from the schedule filed by a bankrupt in proceedings under the United States Bankrupt Act of 1867, C. 176, and had no actual knowledge of those proceedings until after the granting of a discharge to the bankrupt, applies to the District Court of the United States, under Section 34, to annul the discharge for that cause, he cannot afterwards impeach the discharge in an action on his debt in a State court. *Pierson T. K. Burper et al.* v. *David H. Sparhawk*, 635.

SPECIFICATION.

1. Creditors moving to set aside the discharge, may not prove, at the trial, acts of the bankrupt not set forth in the specifications. *Tenny & Gregory* v. *Collins*, 477.

2. A specification in opposition to a discharge, to conform to the requirements of Section 29 of said Bankrupt Act, must allege willful false swearing as well as willful omission from schedule. *In re Keefer*, 389.

STATE COURT.

1. Where creditors, prior to the commencement of bankruptcy proceedings by other creditors, recovered a judgment, and caused execution to be issued and levy made on certain property of the debtor, and also commenced supplementary proceedings in a State court, and had a receiver appointed for certain choses in action, and where, after the adjudication of the debtor's bankruptcy, the receivership under the State court was extended to all the debtor's property, and the assignee in bankruptcy was not made a party thereto,

Held, the appointment of an assignee in bankruptcy relates back, and clothes him with title to all the bankrupt's legal and equitable rights and interests, and choses in action, which belonged to him on presentation of petition. *Smith* v. *Buchanan et al.*, 397.

2. The jurisdiction of the ordinary tribunals over suits to which the bankrupt is a party, is not taken away by mere force of the adjudication; but the Bankruptcy Court has jurisdiction to suspend or control such proceedings, by acting on the parties. *Davis*, 715.

3. In the absence of such interference, the jurisdiction of the State courts remains unimpaired, and their decrees and judgments are valid and effectual. *In re Irwin Davis*, 716.

STATE INSOLVENT LAWS.

1. The Act of Congress passed March 2, 1867, supersedes the State Insolvent Laws, even where the plaintiff and defendant are both citizens of the same State; hence, a discharge under the Insolvent Laws of a State is no defense to an action brought to recover an amount stated to be due on open account. *Cassard et al.* v. *Kroner*, 569.

2. The Bankrupt Act of 1867 does not wholly supersede or suspend the State Insolvent Laws, but jurisdiction can be exercised thereunder until their authority is called in question by the Bankruptcy Courts. *Reed Bros. & Co.*, v. *Taylor et al.*, 710.

STAY OF PROCEEDINGS.

1. Proceedings in an action in a State court will not be stayed simply on the ground that the plaintiffs have taken proceedings to have defendants declared involuntary bankrupts.

In such case an order of the Court of Bankruptcy, adjudging the defendants bankrupts, must be made before they are entitled to a stay of proceedings in the State court. *Maxwell et al.* v. *Paxton et al.*, 210.

2. A creditor who has proved his debt in the bankruptcy proceedings, can-

not maintain an action on the same demand against the bankrupt. His right of action in the State court as well as in the Federal courts is thus waived.

3. It is the intent of the Bankrupt Act of 1867, that the Federal tribunals shall have exclusive control of the assets of the bankrupt, and shall distribute the proceeds among his creditors. *John Wilson* v. *M. Capuro and G. Capuro*, 714.

STOCKHOLDERS.

1. The effect of granting a stay upon a judgment against a corporation before execution returned, or setting aside an execution issued thereon, the stockholders of which are personally responsible, will be to discharge "a person or officer or member thereof" where such liability must be predicated of such judgment, and execution returned unsatisfied. Hence, a motion on the part of the defendants to stay proceedings after judgment must be denied. *Sarah O. Allen, Administratrix, etc.*, v. *The Soldiers' Business Messenger and Dispatch Company*, 537.

2. See "*Lady Bryan Mining Co.*," 394.

SUBSEQUENT EARNINGS.

The earnings and acquisitions of the bankrupt subsequent to the filing of the petition belong to him subject to his eventual discharge: if he does not succeed in procuring that, they remain liable to execution or attachment by his former creditors. *Mays* v. *Manufacturers' National Bank of Philadelphia*, 660.

SUBSEQUENT SECURITY.

Where the note and warrant of attorney on which a judgment was founded, were given within four months before proceedings in bankruptcy, being the agreed security for a loan made at the time, and it conclusively appeared that the creditor had no reasonable cause to believe the debtor to be insolvent, though he knew him to be so at the time of entering the judgment, the judgment is valid.

Where the debtors confided to one of their creditors the secret of their embarrassment and insolvency, for the purpose of protecting their surety, and better securing the collection of the debts by the prompt seizure of their property in execution, and the creditor in consequence of this information immediately issued execution: *Held*, to fall within the provisions of the 35th Section of the Bankrupt Act, and that the assignee was entitled to the property, or to the value of it. *Vogle, Assignee*, v. *Lathrop*, 439.

SUFFERING PROPERTY TO BE TAKEN ON LEGAL PROCESS.

1. The payment of money by one insolvent to his creditor is a preference; the obtaining of it by legal proceedings, not prevented by the debtor availing himself of the law, is adverse to the fundamental principles of the law, and cannot withstand the claims of other creditors and those of the assignee in bankruptcy. *Smith* v. *Buchanan et al.*, 397.

2. Where a judgment is regularly recovered under the laws of a State, and

execution and levy has duly followed the entering of a judgment, *even though* prior to the commencement of bankruptcy proceedings, the same are void if the debtor suffered (not procured) the recovery of the judgment, and the subsequent execution and levy, and the creditor had reasonable cause to believe the debtor insolvent. *Beattie, Assignee of Morse,* v. *Gardner et al.*, 323.

3. The taking of the property of insolvent traders, by a receiver appointed by a State court, is a taking under legal process, within the meaning of Section 39 of the Bankruptcy Act.

A suspension of payment of his commercial paper by a solvent trader, and non-resumption of such payment within a period of fourteen days, is *per se* fraudulent, and an act of bankruptcy. *Hardy, Blake & Co.* v. *Bininger & Co.*, 262.

SUMMARY PROCEEDINGS.

1. To obtain restitution of property or its proceeds taken on summary proceedings is the proper subject of a petition by the person from whom it is taken, and such person will not be held to be a party to the bankruptcy proceedings. Upon filing a petition for the restitution of property, which would be restored, the proceeds must be given to the person from whose hands the marshal made an improper seizure of the property. *In re Harthill*, 392.

2. A petition to a court to order a distribution of a fund lodged in its Registry, is not regarded as an action or suit within the meaning of the 2d Section of the Bankrupt Law. *In re Masterson*, 553.

SURETY.

The security on an appeal bond in Georgia, only binds himself for the payment of the debt or damages for which *judgment may be entered* in the cause, and if no judgment is ever entered against the principal in the cause, no liability attaches to the security. *Odell* v. *Wooten*, 183.

SURRENDER OF PREFERENCE.

1. Until a recovery has been had, by judgment or decree, a preferred creditor may surrender under Section 23; and his right to make probate of his debt and share in the distribution of bankrupt's estate will not be affected by suit commenced and pending against him at the time of such surrender. *In re Kipp*, 593.

2. When the claimants accept a preference on account of a debt, having reasonable cause to believe the same to be contrary to the provisions of the Bankrupt Act,

The payment by said claimants of a decree obtained against them is not a *surrender* within the meaning of the Bankrupt Act, and they are not allowed to prove the said debt against the estate of said bankrupts. *In re Tonkin & Trewartha*, 52.

3. Where an assignee brings his action under the 35th Section of the Bankrupt Act, to recover of a creditor of the bankrupt property alleged to have been sold or conveyed to him in fraud of the act, and where the defendant in such action denies his liability, resists a recovery, goes to trial, and

judgment passes against him, such a judgment conclusively establishes that the creditor sought to obtain a fraudulent preference, and disentitles him to prove up against the estate of the bankrupt, the debt or claim on account of which he received the fraudulent preference. Payment of such a judgment upon execution issued, is not such a *surrender* as is contemplated by Section 23 of the act, and will not enable the party to prove up the claim in satisfaction of which he received property from the bankrupt by way of illegal preference.

Sections 23 and 39 of the Bankrupt Act commented on, and construed to stand together. *Richter's Estate*, 221.

SURRENDER OF PROPERTY.

C & D, partners in business, became insolvent, and confessed a number of judgments in favor of creditors.

E & F, knowing of the insolvency of C & D, at the time their judgments were taken out, caused executions to be issued upon these judgments, and then directed their agent to have the sheriff turn over the property to any agent whom the creditors might agree upon, or to the marshal, in case proceedings should be instituted under the Bankrupt Law.

This was a good surrender of their preference within the intent of the act. *J. J. & C. W. Walton*, 466.

SUSPENSION OF PAYMENT.

The non-payment of a single piece of commercial paper is not an act of bankruptcy in itself, for the reason that there may be a defense to it; but where such suspension is chronic, or there is an inability to meet and pay checks and notes as they mature, then that is such a suspension as the law contemplates, and even though there may be but a single piece of paper and fourteen days past due, the maker may be adjudged bankrupt. *McLean et al.* v. *Brown, Weber & Co.*, 585.

THIRTY-FIFTH SECTION.

Construction of the 35th Section of the Bankrupt Act, and the ingredients of a right of the assignee to recover thereunder, stated and commented on by Treat, District Judge. *Graves*, 651.

TRESPASS,

See *Harthill*, 372.

TRUST PROPERTY.

M. A. C. and M. C. placed in the hands of J. L. J. money to be invested by J. L. J. in trust for their benefit. J. L. J. failed to so invest the money, but used it in his speculations. He afterwards became bankrupt, and M. A. C. and M. C. petitioned to have the assignee ordered to refund the money to them under the 14th Section of the Bankrupt Act.

Held, the prayer of the petition must be denied. Property held in trust does not pass to the assignee by the proceedings in bankruptcy, but it must be property that can be followed or distinguished. When the trust property does not remain *in specie*, but has been made way with by the trustee, the *cestui que trusts* have no longer a specific remedy

against the estate, and must come in *pari passu* with the other creditors. *In re Janeway*, 100.

TRUSTEES.

See *Darby*, 209.

ULTRA VIRES USURY.

A stipulation in a judgment that the interest on it shall bear interest if not paid annually is void, and does not make such judgment usurious. *In re Fuller*, 115.

UNIFORMITY.

See *Beckerkord*, 203.

USURY.

Where judgment has been rendered in favor of the plaintiff on a plea of usury, the assignee in bankruptcy of the defendant cannot open that question, he is privy to and bound by the judgment. *McKinsey & Brown* v. *Harding*, 89.

VOID AGREEMENTS.

1. Where the record before the court does not show that a precedent agreement existed, it is not to be assumed. A mere promise does not constitute an agreement.
2. Any agreement by an insolvent debtor with a creditor (a bank) to create a preference in favor of that creditor is void if the creditor has cause to believe the debtor insolvent, and he is afterwards proceeded against under the Bankrupt Act. *Second National Bank of Leavenworth et al.* v. *Hunt*, 616.

WAGES.

Upon proof of claim made by the father of a minor son, for the labor of such son, as an operative in the employment of the bankrupt, within the six months next preceding the first publication of the notice of proceedings in bankruptcy,

Held, that the father is entitled to be preferred, to an amount not exceeding fifty dollars, according to Section 28. *In re Harthorn*, 103.

WAR.

See *Bigler* v. *Waller*, 291.

WARRANT OF ATTORNEY.

1. The fact that the judgment was entered upon a warrant of attorney does not invalidate the lien, if the creditor did not know of the failing circumstances of the debtor, and if it was not entered up "in contemplation of bankruptcy or insolvency." *Weeks*, 364.
2. A judgment by confession is not void under the code for want of a sufficient statement of the facts out of which the indebtedness arose, except as to the creditors who have acquired a lien upon the debtor's property before a sale upon the confessed judgment. *Quære*, whether such judgment is even then void if it can be shown by evidence *aliunde*, that the judgment was in fact given in good faith and for an actual debt? *Fuller*, 115.

WIFE OF BANKRUPT.

1. Where wife of a member of a bankrupt firm loaned the firm, previous to its bankruptcy, moneys arising from the sale of property which had been held in her husband's name, but the proceeds of which were promised to her in consideration of her executing a deed therefor, said moneys not appearing on the firm books to the credit of the wife, but to credit of her husband as a member of the firm, no separate account appearing in the husband's separate account-books, except under the head of family expense —and where the husband purchased, as the agent of his wife, in her absence from home, real estate, which was conveyed to her in her own name, and which real estate was improved by his wife through her husband, as her agent, and the implements paid for by firm checks, as in payment to her of her loans to the firm. This testimony being objected to as immaterial and irrelevant, and given under and subject to such objections, and the question as to what estate said bankrupt's wife had, and had she any estate except the property above referred to, and was she possessed of thirty-seven thousand dollars, being also objected to,

Held, the questions must be answered. *In re Clark, West, Maxwell, and Davis*, 237.

2. Upon a motion to set aside the discharge granted to a bankrupt, the wife of the bankrupt cannot be required to testify as a witness against her husband. *Tenny & Gregory* v. *Collins*, 477.

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